Abortion Rights in Quebec and Ireland: Divergent Paths

Laura Harris

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Abstract

The ability to control one's personal reproduction should be experienced by all women, regardless of citizenship. For Irish women, however, this does not exist. Ireland's constitutional protection of a fetal right to life exists in direct conflict with a woman's right to control her body.

At first glance, one might point toward Ireland's Catholicism, or perhaps its strong sense of nationalism, as likely reasons. When we consider Quebec, a jurisdiction with a historically strong sense of both Catholicism and nationalism, the answer as to why Ireland has one of the most conservative policies against abortion in the western world becomes more complex. By considering competing institutional strategies, the role of nationalism, the role of Catholicism, elites, and other interest groups, and the impact of multi-level governance, this dissertation seeks to uncover how Ireland and Quebec have such different policies regulating abortion rights.

With regard to institutions and opportunities for the success of social movements, I consider which factors have been both present and absent from the reproductive rights movement in Ireland, ultimately leading to an incredibly slow progression of the liberalization of abortion access. I emphasize the ways that authoritative agents such as Dr. Henry Morgentaler, political institutions such as the Canadian Charter of Rights and Freedoms and an effective women's movement came together to foster the necessary climate for change. I also consider the role of various institutions which affected (both via their presence and absence) the reproductive rights movement in both Quebec and Ireland.

Through this dissertation I found that a jurisdiction's abortion policy is actually a result of a number of intersecting variables. In the case of Ireland, abortion policy has remained quite restrictive as a result of a lack of political opportunity structures that aide in creating a more liberal policy. In Quebec, political opportunities were available for change via institutions such as the Charter, thus allowing for abortion policy to be liberalized. Furthermore, the avenues available for women's movements to create change were very different in Ireland and Quebec.

Dedication

Brad- *We've come so far since that day, and I thought I loved you then…*

Andrew and Claire- *On the night you were born, the moon smiled with such wonder that stars peeked in to see you and the night wind whispered 'Life will never be the same' because there had never been anyone like you, ever in the world.*

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Our son Andrew has taught me what it truly means to be brave, tough and incredibly strong even when things seem nearly impossible. Andrew and Claire have both

shown me first hand that anything is possible, with a little bit of courage and a lot of stubborn determination.

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Chapter 1- Introduction

> Savita Halappanavar's family said she asked several times for her pregnancy to be terminated because she had severe back pain and was miscarrying. Her husband reports that Savita was denied an abortion as there was a foetal heartbeat. Praveen Halappanavar said staff at University Hospital Galway told them Ireland was "a Catholic country". When asked if he thought his wife would still be alive if the termination had been allowed, Mr Halappanavar said: "Of course, no doubt about it." "They said unfortunately she can't because it's a Catholic country," Mr Halappanavar said. "Savita said to her she is not Catholic, she is Hindu, and why impose the law on her. But she said 'I'm sorry, unfortunately it's a Catholic country' and it's the law that they can't abort when the fetus is alive (Cullen, Holland & Hennessy, 2012).

The devastating case, and ultimately death, of Savita Halappanavar highlights a recent example of how difficult it is for women to obtain a legal abortion in Ireland today, despite decades of activism from pro-choice advocates. Although there are instances when an abortion may be obtained legally, for example if a woman's life is in imminent danger as a result of her pregnancy, the details still have yet to be fully clarified by the Irish state and, as a result, access remains highly restrictive. Halappanavar may, in fact, have qualified for a legal abortion in Ireland, as her life was in imminent danger; however the necessary guidelines to allow a doctor to legally perform an abortion have not yet been put into place.

Since at least 1992, policy around access to abortion has been a central question in Ireland. Most commonly, analysts suggest that Ireland's restrictive policies are a result of its strong Catholic heritage and identity. And yet, if we turn to other jurisdictions, such as Quebec, which have also historically formed an identity around a Catholic heritage, we can see that Catholicism alone does not explain policy towards access to abortion. In fact, Quebec has been at the forefront of the Canadian campaign for more liberal access.

Clearly, other variables must also be important. In this dissertation, I draw on a comparison of Ireland and Quebec to understand which factors influence the formulation of abortion policy in a complex society. Through an investigation of several possible factors in two jurisdictions with vastly different approaches to abortion, I will show that the development of abortion policy is dependent on a number of different factors and variables including, religion, nationalism, structures of governance, policy entrepreneurs and political opportunity structures. At first glance, this comparison of Ireland and Quebec may seem unusual, given the differences in jurisdiction. However, as I show below these two share a number of commonalities which make the comparison relevant.

Access to abortion is an important aspect of women's emancipation. The right to control your own body is central to equality and personhood. As such, if the state, such as Ireland, restricts access to abortion by prioritising the rights of the unborn child over the rights of the woman, it clearly demonstrates that the state does not respect woman as equal citizens. Abortion policy, thus gives some insight into the state's overall understanding of women's rights and position in society. Quebec and Ireland, though similar in some regards, have approached the question of abortion in very different ways.

At present, in Ireland, abortion is permissible only when a woman's life is at risk due to physical or psychological harm. This must be determined by three medical professionals. Until very recently (2014), the law was even more restrictive, with abortion permitted only under extreme circumstances. Even with the slightly more liberal approach that has been in place since 2014 and the Protection of Life During Pregnancy Act, the legislation remains controversial and unclear with access rather precarious (*Protection of Life During Pregnancy Act, 2014*).

Unlike Ireland, the second jurisdiction under analysis in this dissertation, is not an independent state. Quebec, as a province of the federal state of Canada, does not have jurisdiction over criminal law, and thus the criminalization (or not) of abortion. Instead, access to abortion in Quebec is determined by the Canadian legislation. However, health care remains largely a provincial matter (Maioni and Smith, 2003). Thus, access to abortion sits at a nexus between federal and provincial jurisdictions. This controversy between national and provincial jurisdictions has been at the centre of much of the abortion debate.

It is necessary to highlight the distinction between law and policy with regard to abortion. For example, policy change may indeed precede formal legal change (as is illustrated in the case of Quebec and its policies toward abortion during the 1960s and 1970s). Indeed, as this dissertation illustrates, policy change on abortion can be the result of a successful feminist movement coupled with the actions or inactions of the provincial government, as was the case in Quebec. Most interestingly, this policy change preceded formal legal change at the Federal level by way of *Morgentaler, 1988*.

In this dissertation, I consider the actions and decisions of actors and groups based in Quebec, as well as the Supreme Court decisions which influenced the legislation not only in Quebec but throughout Canada. Interestingly, the tension between multiple jurisdictions is also evident in the Irish case, as EU legislation has also influenced both the actions and opportunities available to Irish actors.

This dissertation discusses two case studies: the Republic of Ireland and the Canadian province of Quebec. It is certainly not possible to consider either of these jurisdictions without also addressing the influences of other levels of governance. For

Ireland, the European Union and the Council of Europe have played important roles in shaping Irish perception. In Quebec, the legislation is largely influenced by the Canadian state. The fact that these two jurisdictions, Ireland and Quebec, both operate within a complex policy environment makes it possible to compare them, even though they have very different legal capacities with Ireland holding far more sovereign power as an independent state than Quebec holds as a member of a federal state.

Numerous scholars utilize a comparison of Ireland and Quebec (Connolly, 2005; Stevenson, 2006, Matte, 2007) as most-similar systems design, however none have specifically considered each case's abortion policies. Stevenson (2006), argues that Ireland and Quebec share colonial histories, with both beginning as former colonies of the British Empire. Their subsequent identities, though differently defined, were both shaped by the prior relationship to Britain. Isabelle Matte (2007), similarly finds important insights in the Irish-Quebec comparison. She draws on the similarities between the jurisdiction based on their shared Catholic roots. Her historical analysis of the decline of Catholicism in both case studies emphasises a general trend towards social liberalization, while noting that these transitions occurred at very different times in each case. For Matte, increased individualism and liberalization in Quebec during the Quiet Revolution (1960s) contributed significantly to the decline of Catholicism. In contrast, in Ireland, it was only with increased economic prosperity, often coined the rise of the 'Celtic Tiger,' (beginning in the mid-1990s) which has brought about a form of social liberalization and thus a decline in Catholic practices. I use Matte's work on Catholicism in both Ireland and Quebec as a launching place for the consideration of Catholicism as it relates to reproduction in each case study. Connolly (2006) also offers insights into both

the Irish and Quebec cases. She looks at the relationship between Catholicism and feminist activism in the two jurisdictions, finding that the relationship between identity, religion and feminism plays and important role in the shaping of the women's movement in both cases. Her work shows that the relationship between these different aspects of identity is important in understanding feminist mobilization.

Drawing on these comparisons, I suggest that the Irish and Quebec cases are similar in several ways. First, both share a strong national identity, based at least partially on the construction of a British/English other. They both have strong Catholic roots, which may be waning in the face of changing social norms (Matte 2006). Both have women's movements which have sought to navigate the difficult relationships between nationalism, religion and feminism. Moreover, the two jurisdictions offer insight into state and social relations within a complex policy environment, defined in Quebec through federalism and in Ireland through the multi-level governance of the EU.

Thus, the project is structured as a most similar systems approach. A most-similar systems approach looks at cases that are similar in many ways (variables), yet differ on one major variable or outcome. It is this dissimilar variable which is most interesting when considering a most-similar approach. Politically speaking, both Quebec and Ireland operate under principles of liberal democracy. In addition, they share some basic historical commonalities, which form the basis of the variable under investigation. Specifically, the four independent variables found within this dissertation are 1) the impact of nationalism and its ability/inability to intersect with the women's movement, 2) the significance of the role of the Catholic Church, including its priests and related interest groups (as well as opposing pro-choice interest groups), 3) the institutional

strategies and opportunities of each women's movement when seeking greater abortion access, 4) the role played by multilevel governance on abortion legislation. The dependent variable is the outcome of abortion law in each case.

The dissertation considers each of these variables in turn. First, in chapter two, I consider the importance of abortion and reproductive rights as part of the broader feminist debates. The chapter also further explicates the methods and theories central to this study. Chapter three outlines the legal history of abortion in Ireland and chapter four does the same for Quebec. In both cases, I offer a historical discussion of abortion rights protection, restriction, and advancement. Chapters five through seven explore the three variables mentioned above in more detail. Chapter five looks at nationalism's influence on discourses over abortion, particularly as it relates to motherhood. Chapter six, considers the second variable, the role of the Catholic Church in Ireland and Quebec. Chapter seven focuses on the impact of various political and social agents on abortion rights discourses, namely the opinions of the Irish as they are expressed by the women's movement, interest groups and public opinion polls. I also discuss the role of both Irish feminists and Quebec feminists in the debate over expanded abortion access.

In chapters eight and nine, I discuss how these variables fit into the broader political structures. Chapter eight focuses on the relationship between elite entrepreneurs or authoritative agents and the legal structures in place in each case. Chapter nine considers the role of multilevel governance in each case study. In particular, I discuss the impact of EU legislation as well as the European Court of Human Rights (ECHR) on Ireland, and the impact of federalism in Quebec. Thus, a central focus of this chapter is the influence of international actors and multinational bodies on reproduction.

The aim of this dissertation is to consider and the answer the question: how do two jurisdictions that feature forms of multilevel governance with relatively similar variables, namely the presence of nationalism and a history of Catholicism, have such divergent policy on access to abortion? Why does Ireland continue to promote an incredibly restrictive policy towards abortion and abortion rights, and how are they able to continue to do this, especially when compared with the relatively liberal policy toward abortion access in Quebec? A thorough examination of both cases – Ireland and Quebec – through a most similar system comparative case study methodology, is required to explain how one jurisdiction can have such a conservative abortion while another can have such a liberal one.

Overall, it appears that the important factors are the interaction between these different variables. The presence of a particular type of nationalism, feminism and Catholicism have combined with different political actors and opportunities to create two different understandings of the right to access abortion services and the state's role therein. This dissertation finds that the way in which the abortion rights movements in Ireland and Quebec were able (or unable) to use the existing political and social structures have led to the differences in legislation surrounding abortion access.

Chapter 2: Framing the Abortion Debate

> If, as veteran Irish campaigner Mary Gordon contends: 'A measure of the strength of the feminist movement in any country is the strength and confidence of its abortion rights lobby,' a challenge has been issued to the Irish Women's Movement. Now that we have a clearer idea, albeit with the wisdom of hindsight, where the ideological lines are drawn, it is a challenge which we will confront with the greatest urgency (Riddick, 1990, p. 193)

Abortion, as Mary Gordon asserts, is a central component of the women's rights movement. Access to abortion varies widely across states, including within liberal democracies. Moreover, even in those states with liberal legislation, in practice, restrictions can remain. In this chapter, I address some of the ways in which the abortion debate has been framed by states and other actors.

The dissertation draws on a variety of theoretical approaches to help nuance the analysis of the Quebec and Ireland abortion debates to better explain the divergent outcomes experienced in the two jurisdictions. Political Opportunities Structure (POS) is especially helpful in untangling the various interactions between structures and agents and the ways in which these have influenced the policy debates. I draw on various aspects of the POS literature to understand why some interventions were more successful than others. In addition, I rely on some of the tools of institutionalist theories, including path dependency and policy tracing in order to understand how the various political structures took shape, evolve and produce and reproduce a particular policy frame. At all levels, my analysis is influenced by a feminist understanding of policy and a feminist perspective. Feminism adds value to this analysis because the very topic of abortion itself cannot be considered without including the unique ways that pregnancy and in some cases, abortion affects women, both as individuals and as a group. By restricting abortion access the state

is, in many ways controlling women's bodies. A feminist lens can help to uncover the implications of this. As Greg Pyrcz (2001) explains, "To do feminist research is to direct one's attention to the political from the experience of women's lives" (p.3). These experiences vary across borders (and even within them), thus requiring a form of study which considers the unique experiences of women living in various localities, of varying ages, ethnic positions and social positions. Pyrcz (2001) continues that "Feminist studies are, in comparative and international fields, the study of women in their relationship to the power, authority, and processes of marginalization and domination especially in the state…" (p.3). Thus, by employing a feminist approach, I am able to study women's experiences across borders as well as within their own states, facilitating the examination of the variable of location as well as other variables such as religion as separate entities.

The three approaches, feminism, political opportunity structure and institutionalism can be brought together to offer insight into the individual variables at the core of this dissertation. Each theory has something important to offer to the analysis, but none alone is sufficient in explaining the different abortion policies in each jurisdiction. By consolidating these theoretical approaches, however, I am able to make observations that would not have been possible using a single theoretical approach.

Feminist Lens

The feminist lens necessitated all of the theoretical approaches that I take in this dissertation. For example, as Heather Wishik (1985) explains, we can apply a feminist lens to legal research to understand, "how women use and are affected by law and by law's absence" (p. 66). Furthermore, Wishik (1985) argues that, "Seeing, describing and

analysing the harms of patriarchal law and legal systems is part of a feminist jurisprudential inquiry" (p. 66). A second part of feminist legal theorizing is to imagine the legal world free from patriarchy where women's experiences are recognized by law makers and practitioners. In this dissertation, I consider the particular voices or positions represented in discussions of abortion in both Ireland and Quebec, specifically asking, who has created abortion rights laws in each case study, and to what end?

As a means of exemplifying the unique strength of a feminist lens, Bartlett (1991) offers the case of minors requiring parental consent to obtain an abortion. On the surface it may seem reasonable for a state to require that a minor obtain consent before receiving a medical procedure such as an abortion. As Bartlett (1991) explains, "Minors are immature and parents are the individuals generally best suited to help them make a difficult decision" (p. 378). While in theory it may seem that parents are best suited to guide a minor's decision to have an abortion or to carry out a pregnancy, in actuality, "many minors face severe physical and emotional abuse as a result of their parents' knowledge of their pregnancy" (Bartlett, 1991, p. 378). On the surface, the legal question of required consent for minors to obtain abortions may seem quite clear cut, while in actuality, drawing upon practical reason, it becomes clear that there are many potential circumstances at play. Feminism contributes to cases, such as the aforementioned example, by bringing in a unique perspective, which aims to "acknowledge greater diversity in human experiences" (Bartlett, 1991, p. 389). This type of feminist practical reasoning is fundamental to this dissertation, particularly when considering the *X and C cases,* where the rights of the unborn and a pregnant minor are all under consideration. This will be considered further in Chapter three.

Feminists argue that the institutions and the state itself are not gender neutral (Bashevkin, 1996). Rather, for example, through policy men and women and women are constructed in a particular way. For some feminist scholars, such as Lisa Smyth (1992, 1998) and Nira Yuval-Davis (1997), the conception of 'women as mothers' has been constructed as responsible for both the physical reproduction of the nation and the formation of national identity. In addition to a conceptualization of women as producers and reproducers of the nation through sexual reproduction and child rearing, the dichotomy between public and private spheres of citizenship is also considered within this dissertation. Framed within the theoretical context of women as mothers of the state, it would seem that advancements in abortion rights and access to abortion would certainly affect abortion rights discourse.

Seeing women as mothers of the state has important impacts on the way in which nationalism and the role of women intersect. In Ireland, the question of nationalism, identity and women's role in the state have been highly visible. Lisa Smyth (1992, 1998), Ruth Fletcher (2001) and Siobhán Mullally (2005) have all conducted research into the topic of reproduction and Irish nationalism. While Smyth focused primarily on the *X* case and its implications on Irish nationalism, Fletcher conducted an analysis based on Ireland's colonial past and its impact on abortion rights. On the topic of nationalism, Mullally's work on this subject provides an interesting depiction of Irish feminists as anti-nationalist. Specifically, she argues, "Today… the challenges raised by the feminist movements have been perceived not only as hostile to religious-cultural beliefs and practices, but also to the very ties that bind the nation state." (Mullally, 2005, p. 82) Thus, for Mullally, to be an Irish feminist is to oppose Irish nationalism. It is therefore

uncommon to see Irish based feminist groups allying themselves with nationalist projects. This appears in stark contrast to Quebec-based feminist groups, who during the Quiet Revolution of the 1960s, aligned themselves closely with Quebec nationalists, to the degree that they were interconnected movements. For some, this interconnectedness, in turn, provided a key policy window for pro-choice forces to advance a liberalization of abortion access, and eventually abortion policy in Quebec.

For Sylvia Bashevkin (1996), Canada's increasingly liberal stance towards abortion rights comes as a result of the actions of numerous feminists groups rather than the result of government action. In fact, she goes so far as to argue that the relationship between feminist groups and the then Prime Minister Brian Mulroney (1984-1993) could be classified as conflictual, and thus any gains made by feminists during this time period were won *despite* the government. She attributes some of the success of feminist groups to their ability to take advantage of a number of opportunities, including the ability to mobilize the media and foster public support for reproductive autonomy as well as the role of women in elite levels of politics. As Bashevkin (1996) notes,

> In terms of numerical representation at elite levels, Canadian women had been far more successful in gaining key positions than their British and US counterparts. The fact that by the late 1980's, self-identified feminists held the posts of justice minister and briefly Prime Minister (Kim Campbell), deputy leader of the official opposition (Sheila Copps) and leader of the third party in the House of Commons (Audrey McLaughlin) reflected significant change in the senior ranks of federal parties (p. 240).

Whereas the Irish feminists saw the nationalist movement as constraining feminism and specifically abortion rights, Quebec feminists used the nationalist discourse, even in opposition to the Federal state.

In contrast to Mullally, Linda Connolly (2005) argues that the relationship between Irish nationalists and Irish feminists is far too complex to be simply described as existing in opposition to one another. Linda Connolly, Ruth Fletcher and Ailbhe Smyth all write on the topic of Irish feminisms, each employing a unique perspective on feminism itself.

Critiques of traditional feminism constitute a substantial sub-theme in the literature on feminism and reproduction in Ireland. In particular, Ruth Fletcher (1995) and Ailbhe Smyth (1992) call into question the available space for discourses on reproduction within traditional feminist dialogues. For Fletcher (1995), a space needs to be created within Irish discourses on abortion for women to speak about their actual abortion experiences without judgement. She explains that many women feel that in order for public opinion on abortion to change it needs to be discussed in the public realm, however, at present most Irish women feel uncomfortable discussing abortion in a public setting.

Like Fletcher, Smyth explains that she observes a narrowing of feminist discourses on abortion which has been caused by a closing of the necessary space for conducting such discussions. For Smyth (1992), these "observations and questions arise from growing feelings or disquiet, frustration, and an acute sense of being blocked, limited and contained by a political consensus that is becoming more and more difficult to contest and counteract" (p.140). Smyth's position seems to be validated by the fact that state affiliated women's groups such as the National Irish Women's Council (NIWC) have not taken an official stance on abortion. This relatively neutral stance towards

abortion taken by the NIWC appears in stark contrast to Quebec based feminist group's open support for legalized abortion.

Connolly offers a comparative project discussing feminism in Ireland and Quebec, arguing that there continues to be a strong feminist presence in Ireland, albeit one which differs greatly from that found in Quebec. She explains that a unique form of nationalism and Catholicism played a crucial role in the development of each case's own form of nationalism (Connolly, 2005).

For Connolly, while both Ireland and Quebec were historically highly Catholic as well as nationalistic, these developed into unique and different feminist movements. In order to understand the feminist movements of both Ireland and Quebec, Connolly (2005) argues that we need to look beyond nationalism as a distinct variable and look at the ways women have operated outside of nationalist debates, particularly within an international context. Connolly argues that nationalism and feminism are not diametrically opposed, and there are instances where feminists and nationalists agree with one another and instances when they oppose each other. I take a stance similar to Connolly, and show that although Irish feminists have not aligned themselves with a larger nationalist project, the movement has still been shaped by elements of nationalism. In fact, Ireland's form of anti-abortion nationalism has contributed significantly to the Irish women's movement's decision to seek greater access to abortion internationally, rather than within the state.

With regard to the relationship between nationalism and reproduction in Quebec, Diane Lemoureau (2001) argues in much the same manner as Jill Vickers (2002), that nationalism in Quebec is a gendered concept. Thus, as was noted above, women's identity in Quebec was closely connected to a nationalist project, and therefore, if Quebec

nationalists wished to be emancipated from Canada, women too would have to be free from patriarchal control (Lemorouu 2001; Maclure, 2004).

In contrast to Irish feminists, who tend to be antithetical to nationalist movements, in Quebec feminist groups have allied themselves with nationalists along the shared goal of autonomy. This form of nationalist-feminist interconnectedness in Quebec does not exist to the same extent in Ireland. The nationalist movement itself served as an important ally for the pro-choice and women's movements in Quebec, and provided an opportunity to advance common interests and policy, ensuring that a key movement in Quebec society was not opposed to the goals of the women's movement. After the election of the Parti Quebecois in 1976, the women's movement gained momentum with the provincial government in Quebec. This unique and contested relationship between nationalists and feminists is discussed further in chapter four.

Political Opportunity Structure

The feminist and nationalist movements in Ireland and Quebec have been able to interact with the state in different ways and with different levels of success. We can use political opportunity structure (POS) to better understand how these interactions translated into policy in some cases but not others. POS suggests that the ability of a social group or movement to influence policy is dependent upon the structures of governance and the opportunities that are available to agents through these structures (Tarrow, 2005). Sidney Tarrow, a pre-eminent theorist of political opportunity structure, defines a political opportunity as "…dimensions of the political environment that provide incentives for collective action by affecting people's expectations for success or failure"

(2005, p. 77; see also Gamson and Meyer, 1996). In other words, certain political environments, which vary between jurisdictions, provide certain opportunities at certain times. While the social movements that operate within these environments can work to alter the opportunities, they operate in an existing climate and can never fully control it. Specific opportunities may arise, based on a variety of reasons, which will structure the options available for social movements, who must then respond accordingly. By applying some of the ideas of political opportunities structures to the Irish and Quebec cases, it is possible to see which institutions support or constrain agents in their quest for greater access to abortion. Different opportunities resulting from different structures might lead to different outcomes.

As David S. Meyer has aptly noted, "…social protest movements make history…albeit not in circumstances they choose" (2004, p. 125). What is meant by this is that social movements, such as the pro-choice movements in both Ireland and Quebec, do not operate in a vacuum and independent of the circumstances surrounding them in their respective jurisdictions, but rather, operate in a pre-established network with existing social norms, political culture(s), institutions, and competing social movements. In other words, while they do make history, and are able to alter existing legislation, they only do this to varying degrees, depending upon where they operate. These social movements must therefore negotiate with, and sometimes operate in opposition to, pre-existing norms, values, and institutions. The prospects for political change, therefore, vary greatly from jurisdiction-to-jurisdiction, dependent upon the opportunities, or lack thereof, for social movements.

Political opportunity structure then helps to explain the varying roles of pro-choice movements in both Quebec and Ireland in securing access to abortion rights for women. Similarly, POS helps to understand the impact of institutions, and their relationship with said social movements, in altering women's abortion rights.

The ability of a social movement, such as a pro-choice movement, to bring about political change, and even its ability to mobilize support in an effort to bring about said change, is context-dependent (Meyer, 2004, p. 126). More specifically, the ability of a social movement to mobilize, advance particular claims (such as access to safe and legal abortion) over competing claims, cultivate certain alliances in support of said claims, employ specific strategies and tactics rather others, and ultimately impact mainstream politics and policy varies greatly from jurisdiction-to-jurisdiction and depends greatly upon the pre-existing climate into which social movements are born (Meyer, 2004, p. 126). This helps to explain why, despite operating in a jurisdiction with some historic similarities, certain social movements (the pro-choice movement in Quebec) may be able to advance their demands further than other social movements (the pro-choice movement in Ireland). Certainly not all social movements are created equally, and most certainly the climate in which they operate and the opportunities available for them within those climates are far from equal, and go a long way in explaining divergent policy outcomes.

Ultimately, this theoretical approach suggests that while agency matters, there are important structural barriers and structural opportunities that impact the ability of social movements to achieve their goals. Meyer notes that "…activists do not choose goals, strategies, and tactics in a vacuum. Rather, the political context, conceptualized fairly broadly, sets the grievances around which activists mobilize, advantaging some claims

and disadvantaging others" (2004, p. 127-28). Therefore, it is possible to see, as this dissertation will illustrate, a situation in which one social movement (in Quebec) was rather assertive and galvanized and thus able to secure legal access to abortions as early as the late 1980s, while another social movement (in Ireland), found itself in a situation in which the social and political institutional environment necessitate that it remain comparatively more conservative.

As chapters three and four elucidate, despite the overarching similarities, the precise historical and institutional contexts of these cases differ. In Quebec, the opportunities and strategies available to women were comparatively broader than in Ireland. This topic has been illuminated by various scholars such as Micheline Dumont (1987) and Chantal Maille (2004) in Quebec and Marianne Mollmann (2010) of Human Rights Watch focusing on Ireland. As both Dumont (1987) and Maille (2004) explain in their work, feminist interest groups were particularly active during the Quiet Revolution and as this dissertation explains, these groups were instrumental in the shift towards a more liberal position on abortion rights in Quebec.

The political climate in which the pro-choice movement operated was more liberal and provided more institutional resources to affect change. Consequently, this set-up provided more opportunities for pro-choice activists, who were able to employ a broad and pragmatic strategy to help secure legal access to abortion (Dobrowolsky, 2000: 9). In Ireland, such opportunities were not available to the same degree. In the absence of certain political structure and opportunities Irish women's movements were unable to facilitate change in the same way as their Quebec counterparts. However, they made use of the opportunities which did exist, and pursued different avenues towards the same end

goal. These differences illustrate the context-dependent nature of social movements and highlight the impact of the political opportunities both available and unavailable to social movements seeking political change.

An important indicator of the opportunity for social movements to bring about change are the presence (or absence) of political institutions in the jurisdiction in which they operate. Indeed, their presence or absence, and potentially their introduction or disappearance, help to inform the goals, strategies, and tactics of social movements and ultimately delineate their opportunity to bring about policy change. Though immersed more in social movement theory and political opportunity structure, Sidney Tarrow has noted that "…contention is more closely related to opportunities for – and limited by constraints upon – collective action than by the persistent social or economic factors that people experience" (1998, p. 71). Contention, for Tarrow, refers to situations in which "ordinary people, often in league with more influential citizens, join forces in confrontations with elites, authorities, and opponents" (1998, p. 2). This has happened in regard to access to abortion (and abortion rights more generally) in both Ireland and Quebec, albeit with two drastically different degrees of success. Viewed in this light, the success of these social movements is not the result of their strength and influence viewed in insolation, but rather, their strength and influence in relation to political institutions and existing political elites, such as the Catholic Church, nationalist movements, and the state.

Institutions

One way in which social movements can have a greater influence on the existing political elites and ultimately bring about political change is through institutions. As Tarrow notes, "when institutional access opens…challengers find opportunities to advance their claims" (1998, p. 71). The same, or similar opportunities, are created for social movements when rifts appear within elite networks, new allies become available, and state capacity for repression declines. In Quebec, the introduction of a new institution – the *Canadian Charter of Rights and Freedoms* – brought about a new access point for social movements to advance their claims regarding the unconstitutional nature of restricted access to abortions, and subsequently limited the state's capacity for the continued repression of women's rights.

In Ireland, however, the introduction of a new institution, the *European Convention on Human Rights (ECHR)* to domestic law in Ireland, has brought about some access points for political change (Tarrow, 2004, p. 79). The change to laws regulated abortion in Ireland has been slower and less dramatic than in Quebec. As the dissertation illustrates, this is due in part to the structure and limits of the new institutions themselves, but has also been impacted by other factors which have provided, to varying degrees, opportunities to pro-choice social movements, including the relative ability to advance particular claims (access to safe and legal abortion versus increased access to travel abroad during pregnancy), cultivate certain alliances in support of these claims (especially as it relates to alliances with political elites and authoritative agents) and the ability to employ a broad range of specific strategies and tactics. In summary there have been more political opportunities to advance a pro-choice agenda at a much quicker pace

in Quebec than there has been in Ireland, explaining the increased liberality of laws governing abortion in Quebec.

While POS can offer important insights into the relationship between structures and movements, it is less useful in understanding the institutions themselves and the inner workings of those institutions. In particular, POS cannot show how institutions can produce and reproduce a particular frame or understanding of policy. To understand these phenomena, and in particular the ways in which these change, I draw on theories of institutionalism.

In explaining the divergent outcomes of abortion regulation in Quebec and Ireland, one certainly cannot overlook the important role played by institutions and the opportunities they provided to pro-choice social movements to advance claims and impact political policy. Thus, we must consider not only how policy changes occur but also the form that change takes. Wolfgang Streeck and Kathleen Thelen have spoken of the need to view institutions, as this dissertation does, as a "…dynamic political process" that are able to bring about "…incremental change with transformative results" (2005, p. 6). Of course, in two different jurisdictions, with two different sets of institutions, may be more or less dynamic and the results for social movements who utilize them may end of being more (in the case of Quebec) or less (in the case of Ireland) transformative.

The theoretical lens employed by J.S.Hacker (2005) in his analysis of welfare state retrenchment in the United States is particularly insightful for helping to illuminate policy change and the various incarnations that it can take. Although primarily an institutional analysis, it is also useful to identify institutions in and of themselves as one of many opportunities for policy change that pro-choice movements can undertake

(Dobrowolosky, 2000). Their presence or absence, and their ability to create change, have important and potentially transformative impacts on public policy and social movements' ability to shape the change according to their demands.

Hacker (2005, p. 48) has identified four modes of policy change: 'drift,' 'conversion,' 'layering' and 'elimination/replacement.' Each is informed by two variables: barriers to internal change and the status-quo bias of the political environment. The most relevant to Ireland has been layering while elimination has occurred in Quebec.

Elimination/replacement has a low barrier to internal change and a low status-quo bias of the political environment, leading to a situation in which "…a policy is easy to convert and easy to alter through authoritative decision making" (Hacker, 2005, p. 48). This occurred in Quebec following the entrenchment of the *Canadian Charter of Rights and Freedoms*, in particular when it was applied by the Supreme Court of Canada in the Morgentaler case, in which they struck down Section 251 of the *Criminal Code of Canada*, effectively ending any form of state regulation of abortion. 'Elimination/replacement' is a rarity, and one of the other three less-transformative situations is more likely to occur, as was the case in Ireland.

"Layering" is characterized by a higher barrier to internal change and a low status-quo bias of the political environment, and occurs when "proponents of change work around institutions that have fostered powerful vested interests and long-term expectations by adding new institutions rather than dismantling the old" (Hacker, 2005, p. 48; see also Schickler, 2001, p. 13). We are now beginning to see some evidence of layering in Ireland as the *Protection of Life During Pregnancy Act* has come into place, while s.40 (3)(3), or Eighth Amendment Fetal Right to Life, continues to exist. Here the

ability for the *Protection of Life During Pregnancy Act* to foster change in Ireland is constrained by the pre-existing laws protecting the rights of fetuses in Ireland. A second example of layering is the relationship between Ireland and the international laws and cases at play with regard to abortion law. While international bodies such as the ECHR may urge Ireland to reconsider their abortion policies, the pre-condition of the protection of fetal life in Ireland insulates their laws from outside change. Thus, as long as the right to life of the unborn exists in Ireland, any international or national laws regarding abortion will always be subject to this original premise.

"Conversion" is defined by a low barrier to internal change but a high status-quo bias of the political environment and facilitates policies being slowly adapted over time rather than replaced or eliminated in a single sweep, while "drift" consists of high barriers to internal change and a high status-quo bias of the political environment, creating a situation in which it is both hard to shift existing policies and institutions to new ends and eliminate or supplant them (Hacker, 2005, p. 48).

For many years, the strength of both the Catholic Church and a staunchly pro-Irish nationalist movement, coupled with the absence of external laws impacting Irish domestic law, offered little in the way of political opportunities for pro-choice social movements. Consequently, this helped to prevent any meaningful change and the continuation of the one of the most conservative political climates for abortion rights in the western world. Despite Ireland's entry into the European Union and the declining (albeit still strong) role of the Catholic Church, situations of "drift" have remained prevalent, though some instances of "conversion" are increasingly present, providing

larger opportunities for political change for pro-choice movements in Ireland (Hacker, 2005, p. 46).

Of course, political opportunity structure and a focus on the dynamic and changing role of institutions do not alone explain the vastly divergent outcomes in Ireland and Quebec, though they do help contribute to a more full understanding of the barriers and opportunities for social movements, and illustrate the context-dependent nature of success.

In addition to the insights provided by political opportunity structure, institutional theories have also helped to frame the analysis of this dissertation. Institutionalist theories encompass a number of different and varied approaches ranging from rational choice through sociological or discursive institutionalism. In this dissertation I draw primarily on the tools of historical institutionalism in order to understand the continuity and changes in the various institutions over time. According to Miriam Smith (2008), historical institutionalism "…is distinguished by its attention to specific sets of propositions about the role of political institutions in structuring political life, the impact of institutional configurations and the legacies of previous policies on policy outcomes, and the role of time and timing in relation to long-term social and political processes" (p.32). In other words, institutions such as courts and public policy are intimately linked, and one cannot understand the latter without first recognizing the role of the former. These, in turn, impact agents such as pro-choice movements, and delineate their possibilities and limitations. The history of abortion rights in Ireland and Quebec, therefore, cannot be analysed without understanding the role of the High Court and Supreme Court.

Historical institutionalism is useful to this dissertation because it allows for a systematic study of governmental structures, court decisions and shifts in public policy and opinion over time. It allows this study of abortion rights to move beyond the bounded, static descriptions of governmental structures and examine institutions as living, growing, malleable entities. Historical institutionalism is also employed throughout the dissertation where the relationships between the Quebec Courts and the Supreme Court of Canada, as well as Irish law and the EU are considered.

Path dependency, an important part of the historical institutionalist perspective, is also applied to each case study. Defined by Nielson, Jessop and Hausner, path dependency "suggests that the institutional legacies of the past limit the range of current possibilities and/or options in institutional innovation" (1995, p. 6). Along with considering the institutions at play in both Ireland and Quebec I also look at the 'paths' each institutional foundation has created and the ways in which these paths are altered or remain stagnant. For example, in the Irish case, I consider the ways that the constitutional protection of fetal life provided by s. 40(3)(3) created a path of restrictive abortion rights which has not been deviated from (to a significant extent) since 1983. On the other hand, I apply path dependency theory to the Canadian context to uncover the ways that the path of restrictive abortion rights policies was changed drastically with the entrenchment of the *Charter*. The ways that a path may be altered or remain stagnant are also considered, particularly as they relate to 'layering' in Ireland and the EU and 'eliminated' as it pertains to Quebec (Hacker, 2005). For example, evidence of layering, or the enactment of a new policy with the continued existence of an older one, in Ireland is seen with the passage of the *Protection of Life During Pregnancy Act*, despite the fact that s.40 (3)(3),

or Eighth Amendment Fetal Right to Life, continues to exist. In this case, the goals of the new policy may conflict with the existing one, potentially limited significant policy change. In Quebec, the formerly restrictive sec. 251 of the *Criminal Code* was simply eliminated, facilitating a much broader policy change.

Overall, then, my theoretical framework is derived from a synthesis of a gendered understanding of POS and institutionalist approaches. This allows me to consider, on the one hand the agents such as social movements and even individual actors, as well as the institutional structures which may act as barriers of facilitators of change. I gender these two approaches in an attempt to uncover the ways in which different policies can impact on the lives of individual women.

This dissertation relies on a comparative case study method. As highlighted in the opening chapter, the two cases, Ireland and Quebec are considered for their similarities in a number of variables. The primary line of inquiry in this dissertation asks why one jurisdiction – Ireland – can have such a conservative policy while another with quite similar variables – Quebec – can have a comparatively liberal policy. It must be noted that while the variables studied are organized into separate chapters for practical purposes, each of the factors is considered organically as they relate to each other. For example, one cannot consider nationalism entirely on its own within an Irish context. Rather, nationalism and Catholicism are so intertwined that they are in many ways inseparable.

Methodology

At its most basic level, this dissertation offers a case study comparison between divergent abortion policies in Ireland and Quebec. Clearly, the two cases differ in their level of political jurisdiction. Ireland as an independent state has powers and legislative abilities which the province of Quebec does not have. However, if we consider each of these jurisdictions within a broader context, this difference becomes less important. In the contemporary European context, Ireland's sovereignty is partially bound and constrained by regulations and institutions derived at the level of the European Union, and to a lesser degree the Council of Europe. Although Ireland remains fully sovereign, the state's ability to execute this sovereignty is somewhat constrained by the European Treaties. Similarly, in Canada, the federal structures allocate some powers to the provinces, including Quebec. Health care is one such power that is allocated to the provinces. However, the ability to execute independent decisions around these issues remains constrained by the federal laws and institutions.

Despite this difference, Ireland and Quebec share some significant features. Moreover, it is precisely these characteristics which Ireland and Quebec share, that are often touted as explanations for Ireland's restrictive stance on abortion. Like Ireland, Quebec has historically defined itself as Catholic, and has built a nationalist identity around its difference to the dominant Anglo population (Stevenson, 2006). Unlike Ireland, however, Quebec is among the most liberal Canadian provinces with regard to abortion law, and Canada's abortion laws are among the most liberal in the world. When considering both cases, the dependant variable is the ultimate position on abortion, or the outcome of the two abortion rights movements. It is the goal of this dissertation to

uncover the reasons why, at first glance these two cases seem so similar, while promoting very different policies on abortion. A thorough analysis of the two cases illuminates which variables may be essential to a successful abortion rights movement.

I draw upon a most similar systems comparative methodology, as is defined by J.S. Mill's method of difference and method of agreement (George & Bennett, 2005). The method of agreement, or most similar case approach, involves a study of cases which are similar in most of their independent variables, yet have different dependant variables (Bryman, Teevan & Bell, 2009). For example, while Ireland and Quebec share independent variables of a state subject to the external pressures of multi-level governance (Canadian federalism for Quebec and membership in the European Union for Ireland), and are largely made up of a historically Catholic population who have experienced a post-colonial history and are also highly nationalistic, the dependant variable of each state's legal position on abortion is drastically different. It is the differences or dissimilarities between two largely similar cases which are most fascinating to researchers and thus become the subject of a research project. By clearly stating which independent variables I deem to be similar between my case studies (nationalism, Catholicism[1], a unique relationship to multi-level governance and the role of agents in the abortion rights movement), I uncover which dependant variables differentiate each case study from one another in the hopes of determining the significance of these unique variables.

[1]In this dissertation, I recognize that Catholicism, as a variable, is extremely nuanced. When considering the impact of the Catholic Church on debates over reproduction, I begin by looking to the origins of the Catholic teachings on the beginning of human life as well as the topic of abortion, beginning with Aristotle, St. Augustine, St. Thomas Aquinas and Pope Innocent X. I conclude by referring to the Catholic Church's current position that abortion is not permitted in any case. It should also be noted that Catholicism need not be anti-feminist, however in the case of abortion, the official stance of the Catholic Church limits women's choices and is, as such, anti-feminist.

As was described in chapter one, and continues throughout the subsequent chapters, I reveal which of the independent variables have been most influential in the creation of a restrictive state policy towards reproduction in Ireland as compared to more liberal policy in Quebec. In this way, my methodology could be described as problem-driven as the central focus lies in discovering why the two jurisdictions have such drastically different abortion laws.

In order to obtain the data necessary to complete this project I relied on both primary and secondary sources which recounted the legislation and laws surrounding abortion in both Ireland and Quebec. The majority of the primary sources found within this project are official transcripts of Court cases involving reproduction as well as official government documents such as the *Constitution of Ireland* and the *Canadian Charter of Rights and Freedoms*, and, in the case of Ireland, the various abortion-related amendments to the Constitution.

Contained within this dissertation are considerations of both the role of agents and structures that impact abortion rights access. Specifically, when taking into account the role of agency, I look to the impact that interest groups as well as particularly influential individuals have had on abortion rights in both Ireland and Quebec. In particular, I consider the way that interest groups interact with each other, as well as with government bodies. Here the actions and discourses of influential agents such as Supreme Court Justices, religious officials and medical doctors will be termed 'authoritative agency[2]'. Authoritative agency refers to the actions and influence of individuals who are in positions of authority within society and to whom citizens turn to for information, whether from within or outside formal government positions. This differs slightly from a

[2] Authoritative agent is a term I have theorized for the purpose of this dissertation.

policy entrepreneur who may often seek change from outside formal political positions (Roberts and King, 1991).

With regard to the historical comparative method of this project, this methodology was quite useful as it allowed for the study of a meta-question, namely which societal factors contributed to the formation of a restrictive policy towards reproduction in Ireland and a more liberal policy in Quebec. Drawing upon a form of historical process research, I was able to trace the actions of the legislature, judicial bodies and international bodies in each case study over a period of over thirty years. This project also facilitated the use of cross-sectional comparative research as I was able to consider the climate of abortion rights in each case during the same time period, namely 1982-2014. With regard to Ireland, this project emphasizes the time-period from 1982 onward. In 1983, via a popular referendum, s.40 (3) (3) was introduced into the constitution of Ireland, protecting the right to life of the unborn. The significance of s. 40(3) (3) is that it effectively limits when abortion may be performed by invoking a legally protected fetal right to life. In Quebec, 1982 marks the entrenchment of the Charter of Rights and Freedoms and thus provided an important opportunity challenge existing legislation. The *Canadian Charter of Rights and Freedoms* ultimately provided the opportunity that the pro-choice movement and Dr. Henry Morgentaler in particular needed to successfully challenge Canada's prohibition on abortion (s.251).

An exploration of the ways that the *Charter*, as an institution, impacted the abortion rights movement and shaped the legal status of abortion in Quebec is crucial to this dissertation. The entrenchment of the *Charter* is of incredible importance as it was the first written, constitutional document in Canada that protected individual rights from

government interference. Section 7 of the *Charter*, which protects the rights to life, liberty and security of the person, seemed to provide an important opportunity to pro-life advocates (the protection of life) and the pro-choice movement (liberty and security of the person) in Quebec, as it was this section that the Supreme Court of Canada looked to when considering the legality of s.251 of the Criminal Code's prohibition on abortion. Ultimately, this opportunity proved to be more useful to the pro-choice movement than to the pro-life movement. However, to understand this time period, it was necessary to go back to some of the early discussions and legislation. This is done primarily in chapters three and four.

Although scholars such as Ruth Fletcher, Lisa Smyth, and Siobhán Mullally have speculated as to the causes for restrictive abortion rights laws in Ireland, none have done so in a comparative manner with another Catholic, Nationalistic and liberal-democratic case study (Fletcher, 1995, 2000, 2001; Fox and Murphy, 1992; Smyth, 1998; Gomperts, 2001; Cook and Dickens 2003; Cichowski, 2004; Davey, 2005; Mullally, 2007; Baker, 2008). With regard to the variable of Catholicism, Alicia Czerwinski (2004) has conducted an in-depth study of Poland's restrictions on abortions, drawing at times upon the Irish case study as a reference point, but has not considered the comparison of Ireland and Quebec. Furthermore, while previous scholarship from Connolly (2005), Stevenson (2006) and Matte (2007) have compared the nationalistic tendencies of Ireland and Quebec, a direct comparison of the history of abortion rights movements and restrictions has not been attempted.

Indeed, this notable gap in the literature represents a major shortcoming in a highly important field of study. This dissertation contributes to the scholarship in the area

and represents (to my knowledge), the only comparative project on abortion rights in Quebec and Ireland, particularly emphasizing the role of feminist activism.

When considering the comparative elements of this project, I look to the methodology and scholarship of Stevenson (2006), Connolly (2005) and Matte (2007) in their comparison of Irish and Canadian (Quebec) nationalisms (and feminisms in the case of Connolly), as a launching place for my own inquiry into the ways in which nationalism and religion affect abortion rights movements. By focusing on abortion rights in each case study, this dissertation is able to further elaborate on and advance the scholarship of those who began by simply comparing Irish and Canadian (Quebec) nationalisms.

A comparative study of Ireland and Quebec sheds light on the variations in abortion rights and possible variables which could contribute to their differential articulation, ultimately shedding light on the reasons why abortion rights protection is at times similar, yet more often than not highly dissimilar, in Ireland and Quebec, both of which are highly nationalistic and historically Catholic. Another unique element of this project is that it challenges the "common" explanations of Ireland's restrictive policies, and subsequently offers a better understanding of the frames of the abortion debate and women's rights in general.

In the next two chapters I offer a comprehensive outline of the legal history of abortion in both Ireland and Quebec. Once the histories have been presented I proceed to explain how the various variables mentioned above shaped each case's abortion movement.

Chapter 3: History of Abortion Law in Ireland

> When the defendant learned that she was pregnant she naturally was greatly distraught and upset. Later she confided in her mother that when she learned she was pregnant she had wanted to kill herself by throwing herself downstairs. On the journey back from London she told her mother that she had wanted to throw herself under a train when she was in London, that, as she had put her parents through so much trouble, she would rather be dead than continue as she was. On the 31st January, 1992, in the course of a long discussion with a member of the Garda she said: "I wish it were all over. Sometimes I feel like throwing myself downstairs". And in the presence of another member of the Garda, when her father commented that the situation "was worse than a death in the family", she commented "Not if it was me." (AG of Ireland v. X, 1992, at p.8)

The above commentary describes the thoughts of 'X' (the 14-year-old girl who became the centre of the highly publicized case *AG of Ireland v. X* in 1992) during and after the time that she required an abortion in Ireland. Her commentary is quite telling of the desperate position in which many Irish women find themselves as the state continues to deny access to safe and legal abortion.

When considering the way that abortion laws and reproductive rights have taken shape in both Ireland and Quebec, it is necessary to note the way that each jurisdiction has framed the issue of reproductive rights.[3] For Fletcher (2000) abortion has been constructed in three different ways: abortion as a public health need (as is exemplified by abortion debates in Western-Europe), abortion as a right derived from personhood or autonomy (as is exemplified by abortion rights debates in North America) and abortion as an economic right or commodity that women should have access to as consumers (as is exemplified by the *Grogan* case in Ireland).

[3] For a chronological list of major cases in both Irish and Canadian reproductive rights legal history please see appendices 1 and 2 at the conclusion of this dissertation.

In Ireland, abortion debates are often focused on the right to life of the unborn and the state's responsibly to protect that right, often to the detriment of women's autonomy. In contrast , abortion debates in Quebec are often framed within a form of rights-based dialogue with the aim of determining when and where a woman may have access to abortion services, thus placing women at the centre of this issue, rather than the fetus. As Ruther Fletcher (2000) explains, debates over abortion access in North America have been framed in terms of a woman's autonomous right as a human being.

As Fletcher's description of the three constructions of abortion dialogues suggests, as part of the North American model, Quebec has focused its debates on the rights of women as autonomous individuals. As will be explored in the next chapter, it was a woman's right to life, liberty and security of the person, guaranteed by S.7 of the *Charter*, which ultimately helped to lead to the de-criminalization and legalization of abortion in Quebec.

In the Irish case, and to the degree that there is any focus on women, many of the legal battles surrounding abortion (such as *Grogan* and *A, B and C v. Ireland*) have focused on issues of the right to travel and to have access to information as well as medical services (although rights of the fetus remain the predominant discourse). Here the emphasis is not on women's rights as women, but instead as economic consumers bearing the rights of economic services and mobility guaranteed by the EU. As will be illustrated below, the way that abortion and reproductive rights are framed in each case constitutes the first differentiating element between Ireland and Quebec.

I begin by presenting a historical outline of reproductive rights protection and litigation in the Republic of Ireland as they have been advanced and denied by three

leading institutions: a) the legislature of Ireland (specifically through the referenda which were called for by the legislature in 1983, 1992 and 2002), b) the Supreme Court and the High Court of Ireland, and c) the relevant cases from International law that pertain to Ireland.

The following chapter is then devoted to outlining the legal history of abortion in Quebec, focusing on the legal battles of Dr. Henry Morgentaler as well as the landmark case *Tremblay v. Daigle*. As has been previously noted, as abortion regulations fall under criminal law in Canada, they are addressed at the federal level, and therefore it is necessary to consider both Quebec and Canada here. Chapter five also includes a discussion of the legislature's response, as well as individual parliamentary members' responses to the Court's decision in the Morgentaler case, which were limited and have not been made into law.

Abortion in Ireland under UK/British law

As Janine Brodie, Shelley Gavigan and Jane Jenson (1992) explain, in its earliest form, abortion related regulations were largely ecclesiastical in nature and were left to the teachings of various religious doctrines. It was not until 1803 under *Lord Ellenborough's Act* in Britain that the state itself began to regulate abortions by way of imposing the death penalty upon women who procured abortions after quickening (Brodie et al., 1992)[4]. The earliest example of Ireland's prohibition of abortion is found in sections 58 and 59 of the 1861 *Offences Against the Person Act*, which outlines the punishments for both causing and assisting with an abortion. Specifically, in regard to pregnant women who procure or attempt to procure an abortion, s. 58 of the *Act* stated:

[4] Quickening refers to the time at which a pregnant woman first feels movement from the fetus.

> 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 and instrument or other means whatsoever with the like intent, and whatsoever, with intent to procure the miscarriage of any woman, whether she be or not be 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 a felony, and being convinced thereof shall be liable to be kept in penal servitude for life (*Offences Against the Person Act*, 1861, s. 58).

Similarly, in regard to those who procure an abortion on behalf of a pregnant woman, s. 59 of the *Act* states:

> Whoever 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 misdemeanour (*Offences Against the Person Act,* 1861, s. 59).

At present both s. 58 and s.59 of the *Offences Against the Person Act* remain in force in the Republic of Ireland. The difference in punishment for a pregnant woman ending her own pregnancy versus the individual assisting is quite astounding. When considering the legal and legislative history of abortion in Ireland it is necessary to briefly look at the justifications for Ireland's restrictive stance towards reproductive rights. Two central themes that are found within the legal history are the connection between women and mothering, and the ties between Irish nationalism and a restrictive stance on reproduction. With regard to the relationship between women and mothering, the 1937 *Constitution* provides a clear example of Irish law reflecting the prevailing moral values in Ireland.

The clearest account of 'Irish Laws' and Irish values is illustrated by Article 41 (2) of the 1937 *Constitution*, which asserts, "[t]he state shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home" (*Irish Constitution*, 1937, Article 41 (2)(2). The very fact that the Constitution of Ireland states that women have explicit duties within the home is telling of the idealized role of women in society, and thus illustrates a prevailing connection between women and the private sphere within Ireland. The constitution also describes women as 'mothers', suggesting that it is a natural duty for women to become mothers. I also consider the role of the Irish constitution (particularly the November 25, 1992 referendum on abortion and amendment 40(3) (3) which protects the life of the unborn child), Irish High Court and Irish Supreme Court in the debate over reproductive rights.

I begin this section by briefly outlining the five abortion referenda (1987, three in 1992, and 2002) that have taken place in Ireland, highlighting the significance of the Irish constitution and in particular, article 40(3)(3). With regard to reproductive rights case law, I look at a focused list of prominent Supreme Court and High Court cases in Irish Law: *Attorney General of Ireland v. X* (1992), *Attorney General (at the Relation of the Society for the Protection of Unborn Children (Ireland) v. Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd* (1988, 1992), *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan and others* (1989, 1991), *D v. Ireland*, 2005, as well as the case of *Miss D v. District Judge, HSE, Ireland Attorney General, 2007* (Fletcher, 2000).[5] It should be noted that of the above listed cases, the *X* Case, *Open Door Counselling*, *Grogan* and *Miss D* are the most relevant to this dissertation as they

[5] See Appendix 1 for full list of cases along with a timeline of abortion related law in Ireland.

consider the most basic rights of reproductive choice as well as access to travel and information.

By way of introduction to the history of abortion litigation in Ireland, drawing upon the work of Siobhán Mullally (2005), I offer a brief historical sketch of the history of abortion related referenda in Ireland beginning with the 1983 Right to Life Referendum, also known as the 8th amendment referendum. I then discuss the most significant abortion related cases in Irish law. After having discussed the impact of these cases on Irish law and public opinion, I outline the cause for, and results of, the three referenda held in 1992 on amendments twelve through fourteen, and the 2002 referendum on the twenty-fifth amendment.

The first referenda on abortion in Ireland took place on September 7th, 1983. In Ireland, prior to 1983, abortion solely fell under the jurisdiction of the 1861 *Offences Against the Person Act*, which made abortion a criminal act throughout the United Kingdom and Ireland (*Offences Against the Person Act*, 1861, S. 58, S.59). Interestingly, when Ireland gained its independence from the U.K. in 1922, it continued to follow the 1861 *Offences Against the Person Act*. As early as 1938, the *Offences Against the Person Act* was challenged in England when Dr. Aleck Bourne performed an abortion on a fourteen year old rape victim at St. Mary's Hospital in London (*R v Bourne*, 1938). Bourne performed an abortion in 1938 and was charged, but later acquitted, on the grounds that refusing an abortion could endanger a woman's (or young girl's) mental or physical health (*R v. Bourne*, 1938). However, even when the legislation was challenged in the U.K., Ireland continued to apply and uphold the ban on abortion.

The *Abortion Act, 1968* legalized abortions performed to save the life of a pregnant woman in Great Britain, but not the territory of Northern Ireland, or the now independent Republic of Ireland. This makes the possibility that there is something inherently "Irish" about rejecting abortion seem even more plausible. *The Abortion Act* was first introduced to British parliament by David Steel as a private member's bill in 1967. The proposal was supported by the current government, who then created a medical advisory committee to investigate the specific details of the bill further. The purpose for the proposal of the Bill and ultimate legalization of abortion (in specific circumstances) was to limit the occurrence of complications experienced by women who obtained illegal abortions. Thus, the Bill was not proposed as a way to increase women's autonomy but rather to prevent harm caused by illegal abortions.

In April of 1968 the Bill was subject to a free vote before British parliament, where it was officially passed into law becoming the *Abortion Act of 1968.* The specific provisions of the *Act* are as follows:

> [With regard to the] Medical termination of pregnancy (1)Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith, (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped (*Abortion Act, 1968*, s1, subsections 1-4).

As the *Abortion Act* clearly illustrates, while abortion laws were clarified in 1968, this did not create a universal right to abortion in the UK. Abortions in the UK are at present subject to particular gestational limitations as well as medical approval regarding the necessity of an abortion. Even though the *Abortion Act* did not legalize abortion in the Republic of Ireland, or Northern Ireland, its significance to the Irish case must not be overlooked. Once the legal provision of abortion services became available just a short distance from Ireland itself, the focus of the women's movement could shift from legalizing abortion in Ireland to finding ways to secure a woman's right to travel abroad for abortions and to obtain information on reproductive rights services. While it might be expected that the UK's liberalization of abortion would influence Ireland to follow suit, this was not the case. Thus, British liberalization provided an opportunity for the Irish women's movement to focus on, and eventually secure, access to travel abroad while pregnant.

The next case bearing significance in Ireland took place in 1974, via *McGee v. Attorney General of Ireland*, where marital privacy and contraceptive use within marriage were legally secured (*McGee v. Attorney General of Ireland*, 1974). One year earlier in 1973, *Roe v. Wade*, had made abortion legal in the United States. This caused some tension in Ireland as many Pro-Life/Anti-Choice lobbyists believed that this type of legislation could one day affect Irish law. Thus, although others such as England and the United States were beginning to liberalize their abortion laws, Ireland maintained its criminalization of abortion in all instances. Rather than addressing the abortion question specifically, the Irish women's movement focused on contraception.

Foundations of the Right to Life of the Unborn - 1983

In 1983 in Ireland, an effort to further secure the criminalization of abortion into Irish law occurred when pro-life groups, including the Pro Life Amendment Campaign (PLAC), lobbied for a constitutional amendment which would secure the right to life of the unborn. It should also be noted that much of the motivation behind the pro-life group's push for the protection of the right to life of the unborn can be attributed to cases surrounding abortion that were taking place in the United States, England and within Ireland itself (Mullally, 2005). A co-ordinated move to criminalize abortion and effectively regulate women's autonomy cannot be divorced from notions of the idealized version of Irish women (as specifically articulated by the 1937 *Constitution*) and the general demand on women to reproduce the family unit (and the nation) through the act of childbirth.

As legal precedent securing a right to abortion began to present itself in both the U.K. and the United States, pro-life lobbyists pushed for an eighth (8^{th}) amendment to the Irish constitution, which would secure the right to life of the unborn in an effort to ensure that Ireland would not follow the route of other western liberal democratic states whose laws regulating abortion were increasingly becoming liberalized. The PLAC and other pro-life lobbyists were successful in their call for a referendum on the right to life of the unborn. On October 7th 1983, by popular vote, the Irish constitution was amended to include section 40(3) (3).This states that:

> 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 (*Irish Constitution*, 1937).

Thus, with the entrenching into Irish law of a right to life for the unborn, the Irish government attempted to create a universal ban on abortion in Ireland, which in many ways placed the rights of a fetus on equal ground, and in practice often a superior position to the pregnant woman.

This is the most important part of S. 40(3)(3) - it makes the potential life of the fetus equal to that of the woman carrying it. Consequently, unless a woman's life is in danger as a result of pregnancy, the fetus must be carried to term. In other words, women did not have the right to choose how their pregnancy would proceed, and once pregnant, a woman was compelled to carry the fetus to term. In fact, with an equal right to life, in some cases, the woman's life could be "sacrificed" for the life of the unborn child, if that child could be delivered safely.

The passing of s. 40(3) (3) into Irish law set into motion a legal journey which would, over the next 10 years, raise the questions of when does a woman have the right to travel to obtain an abortion, what types of abortion related information should Irish women have access to and finally, are there any cases in which abortion could be justified under Irish law?

In 1985 and 1988, in a case now known as *Open Door Counselling v. Ireland*, a pro-life group called the Society for the Protection of Unborn Children (SPUC), claiming to seek to protect the right to life of the unborn, took pregnancy counselling centres (Open Door Counselling and others) and student union officers (Grogan) to the Irish High Court and Irish Supreme Court for unlawfully distributing information on abortion centres in the U.K (*SPUC v. Grogan and Open Door Counselling and Dublin Well Women Counselling*, 1991). The SPUC claimed that, under the Irish Constitutional ban

on abortion, the act of providing pregnancy counselling services and information (as Open Door Counselling was doing) was illegal. They argued that it was also a crime to provide information that could lead to an abortion in Ireland. Thus, in 1985 SPUC initiated a High Court inquiry into the legality of offering pregnancy and abortion related information sharing by Open Door Counselling and Dublin Well Women Counselling (Irish Family Planning Association, 2010). The response of the Irish Courts was to issue injunctions against Open Door Counselling and Dublin Well Women counselling centres as well as student unions, effectively prohibiting them from providing women with information on abortion services available within the U.K. or elsewhere (Fletcher, 2000).

In both *Open Door Counselling* and *Grogan*, the respondents claimed that abortion was a medical service protected by European Community (EC) law, and, therefore, Ireland's restriction on free information and services for women seeking abortions violated this right (Fletcher, 2000).

Where EC/EU and national law conflict, as was the case here, the national courts have an obligation to refer to the ECJ for interpretation of the European legislation. However, since the Irish Courts did not recognize there to be a conflict between the two sets of legislation, nor did the Courts accept European jurisdiction in the case, the question was not referred to the ECJ. As a result of the Irish High Court and Irish Supreme Court's decision to deny the applicability of EC laws to abortion information access, and thus refusing to refer the case to the European Court of Justice (ECJ), Open Door Counselling decided to take the case to the European Court of Human Rights (ECHR) (Fletcher, 2000). It is important to note that the ECHR is a body of the Council or Europe, rather than the European Union. Its decisions are only "advisory", although a

positive ruling does carry substantial pressure to conform. Ireland's entry into the EU provided Irish pro-choice activists with a new institutional opportunity to air grievances against the Irish state and advance demands of more liberalized abortion policy as a result of individual pro-choice activists to having the ability to access new legal institutions such as the ECHR. This, in turn, allowed for more voices – those of the European community, which tend to be far more liberal than Ireland on issues of reproductive rights, an opportunity to enter into the debate and engage directly with the Irish state.

The ECJ and ECHR differ from one another in that the ECJ rules only on EU law, as its jurisdiction is over members of the EU. In contrast to the ECJ, the ECHR rules on the rights protected by the European Convention on Human Rights, which protects a broader membership in Europe, and more specifically individual citizens, not just member states within the EU. Furthermore, the ECHR is unique in that it allows individuals to approach the Court if they feel that their rights under the European Convention on Human Rights have been violated. It should be noted that, "While the judgements of the [ECHR] are 'essentially declaratory in nature,' should Ireland refuse to follow a mandate of the Court, it could be expelled from the Council of Europe" (Weinstein, 188-189, 1993). With regard to Open Door Counselling's case, the significance of this distinction between the ECJ and ECHR is that while a referral from a state-based Court is necessary to have a case heard before the ECJ, the ECHR may be approached by an individual without referral from a state-based Court.

Following the injunctions taken against them by the SPUC, Open Door Counselling had been forced to close their pregnancy counselling centres. Consequently, the ECHR claimed that "this constraint on the provisions of information violated their

rights to privacy and to freedom of expression under the European Convention for the Protection of Human Rights and Fundamental Freedoms under the European Convention" (Mullally, 2005, p. 94). The ECHR found that Ireland's prohibition on abortion information fell within the scope of permissible restrictions on the right to freedom of expression because its aim was the preservation of a public good, or, more specifically, public morals (Mullally, 2005).

However, the ECHR ruled that the injunction's absolute ban on all abortion related information did not satisfy the proportionality test required for a restriction on freedom of expression and subsequently found that Ireland had violated Article 10 of the European Convention, which protects freedom of expression (*Open Door Counselling and Dublin Well Women v. Ireland*, 1993). The ECHR concluded that the ban on all abortion related counselling "was overbroad and the restrictions had the disproportionate effect of causing women to obtain abortions later, depriving them of medical and counselling services" (McBrien, 2002, p. 5).

Thus, it was deemed that Ireland's ban on sharing information on abortion clinics abroad was in violation of the European Convention. As a result, women's health clinics based in Ireland are now permitted to share information on abortion clinics abroad, thus leading to further instances of abortion tourism, or women travelling purposefully abroad for the sole purpose of obtaining an abortion. This served as an important victory for the Irish pro-choice movement, and is an example of the "conversion" of policy (Hacker, p. 2005: 48). In this instance, the pro-choice movement was able to adapt a policy over time, rather than fully replace or eliminate it. As such, this was a small, yet important, change that liberalized access to information on abortion within Ireland, ensured access

to it outside of Ireland, but did not fundamentally alter the existing criminalization of abortion within Ireland.

Another significant case for Irish abortion law, as mentioned above, is *SPUC v. Grogan*. In *Grogan*, the SPUC applied to the Irish High Court for an injunction preventing a student group led by Steven Grogan from distributing pro-choice related information (*SPUC v. Grogan, 1991*). In this case, the High Court judge declined to rule on the case and referred it to the European Court of Justice (ECJ) for a preliminary ruling as many of the questions were grounded in the interplay between EU and Irish law (McBrien, 2002). The High Court asked the ECJ, a) if abortion was a "service" within the meaning of the Treaty of Rome (1957) and, b) if student groups had a right under European Community law to distribute information concerning abortion services available in other member states (Mullally, 2005).

In their response to the Irish High Court, the ECJ defined abortion "solely in terms of the possible commerce and profit resulting from it," thus concluding that "the termination of a pregnancy in accordance with the law of the state in which it was carried out constituted a service within the meaning of the Treaty of Rome" (Mullally, 2005, p. 91). In other words, for the ECJ, abortion qualified as a service protected by Article 60 of the European Treaty (*SPUC v. Grogan*, 1991). As Mullally (2005) points out, the ECJ's ruling in *Grogan* is only a partial victory for pro-choice groups, or, an example of "conversion" as the understanding of abortion policy was, at best, adapted, and certainly was replaced (Hacker, 2005). Practically speaking, however, this case did not fundamentally alter access in any meaningful way, as the ECJ did not address the notion of reproductive rights as a matter of human rights. Furthermore, since student groups did

not have ‘direct links’ (as they were not actually providing abortions) with the provision of abortion services in the U.K., they could not claim the protection of EC law” (Mullally, 2005, p. 91).

The *X* Case - 1992

Shortly after the ECHR and ECJ’s rulings in *Open Door Counselling v. Ireland* and *SPUC v. Grogan*, the *X* case took place in Ireland. While S. 40.3.3 created a constitutional ban on abortion in Ireland, it also, as noted above, included a prohibition of abortion related information, either on reproductive services available in Ireland or abroad. The *X* case takes this question of access to information a step further by challenging a ban on travel that had been imposed to prevent women from accessing abortions abroad. Although abortions were performed abroad prior to *X*, it was illegal to blatantly make this action known to the Irish government, thus presenting the Irish people with a moral dilemma which ultimately created a liberalizing force within Irish public opinion.

In *X*, a fourteen-year-old girl from Dublin became pregnant when she was raped by an adult family friend. When X attempted to travel to Britain with her parents to obtain an abortion, an injunction preventing her from travelling was issued by the Irish High Court (Smyth, 1998). Although X was only 14 and her parents were supportive of her decision to obtain an abortion, their consent would not have been needed for the procedure had she elected not to notify them, or if they had not been supportive. It should be noted that under U.K. law, the age required to obtain an abortion is quite liberal in comparison with other common-law jurisdictions (de Cruz, 2001). In fact, there is no

minimum legal age in order to obtain an abortion, nor is there a requirement for medical staff or councillors to notify parents, despite recent challenges to this (BBC, 2006). In order to receive an abortion in the U.K. one must simply be seen by the doctor performing the abortion as being rationally competent, and he or she must be convinced that the teenager understands her decision and that she made an attempt to tell her parent or another responsible adult (Curtis, 2006).

The Department of Health guidelines have stressed the fact that a young person's right to receive medical treatment overrides their parents' right to know of said medical treatment, regardless of age. The only exception to this right of privacy is when a medical professional suspects the child is being abused. The High Court based its decision to restrict X's ability to travel to the U.K. for a legal abortion on section 40(3) (3) of the Irish constitution, which protects the right to life of the unborn. As Ailbhe Smyth (1992) explains, the Irish Attorney General justified the injunction on the grounds that "he had clear evidence that a foetus with guaranteed rights under the Constitution was about to be aborted and that he must act immediately to prevent this in his capacity as protector of the people's Constitutional rights" (p. 10).

What is quite interesting about this case is that the evidence of X's decision to attempt to obtain an abortion only came to the attention of the Attorney General after the Irish Police contacted him upon speaking with X's family. X and her family had travelled to the U.K. to obtain an abortion, but before the procedure was carried out, they contacted the Irish Police to ask if the forensic evidence collected via the abortion could be used to prove the paternity of the fetus, thus confirming the identity of X's rapist. In the process, they unwittingly alerted authorities that an 'illegal' abortion was about to occur (Smyth,

1992). It was this act of contacting the police for information that led to the knowledge of X's attempted abortion, which in turn led to the injunction forcing her to return to Ireland or face criminal charges. The greater significance of the *X* case is that it directly illustrates the clash between maternal and fetal rights that is ever-present in Ireland. In the *X* case, in particular it is fascinating to note that rights in conflict with one another are those of a fetus versus a child.

After a great deal of media attention, the Supreme Court, in a four-to-one decision, lifted the injunction placed on X arguing that "X had a right to an abortion and could not be stopped from travelling abroad in order to obtain one because her life was at 'real and substantial risk" (Fletcher, 2001, p. 581). The Court based its decision on the fact that X had expressed the desire to commit suicide if forced to maintain her pregnancy (*Attorney General v. X*, 1992). Another factor which influenced the Court's decision in X was the tremendous amount of public outcry expressed in Irish newspapers, which – despite Ireland's general conservative thrust regarding reproductive rights – was generally supportive of X's plight. When offering a judgement in the X case and s.40 (3) (3) of the Constitution, Irish Supreme Court Justice Niall McCarthy explained that "…the failure by the legislature to enact appropriate legislation is no longer just unfortunate; it is inexcusable. What are pregnant women to do? The amendment s.40 (3) (3)…remains bare of legislative direction" (*Attorney General v. X*, 1992, p. 82).

Justice McCarthy's disgust at the absence of clear legislation on s.40 (3) (3) was echoed in the Irish media where the High Court's treatment of X was portrayed as having "legitimized child abuse and rape" (Smyth, 1998, p. 68). The fact that X was viewed by the Irish public as a child herself brought the internal contradiction of s.40 (3) (3) and its

protection of the life of the unborn as well as the potential mother into the political eye. In the *X* case, the woman in question was simultaneously a child, a rape victim and a potential mother and a woman, bringing into conflict Ireland's policies of protecting Irish family values and its prohibition of abortion. As Lisa Smyth (1998) explained of this peculiarity,

> The significance of the X case lay in the fact that a 14-year-old girl had been raped by a trusted family friend…when the rape came to light there was a clear parallel with incest. Abortion could suddenly be seen in cases of 'child rape'…because X could not have consented to having sex with this man, who was firmly within the network of close family ties…Abortion was the only means of restoring 'normal' family life… (p. 76)

Thus, the *X* Case presented a paradox for many pro-life supporters as the very fact that a 14 year old girl was raped raises questions. At what point must Irish law act to protect children from potentially life threatening pregnancies and what should be done where moral values conflict with one another, for example in the case of rape, particularly where a child is concerned?

As a direct result of the Court's ruling in *X*, three referenda were held in 1992. Respectively, the first asked: do Irish women have the right to travel (to obtain an abortion), and the second asked: should there be a right to information on abortions outside of Ireland? The third called for a constitutional ban on the use of the threat of suicide as legal grounds for abortion. These referenda clearly illustrate the various clashes of rights in Ireland, specifically the tension between a woman's right to freedom of travel and access to information and the state's desire to place prohibitions on access to abortion. The relatively common usage of referenda to solve important political issues provided an opportunity for both pro-choice and pro-life supporters. The specifics of the

X case that facilitated these referenda, and the high level of public support for the perils of X, meant that the referenda provided a better opportunity for pro-choice forces, as evidenced by the eventual results.

These prohibitions were constructed under the guise of fetal rights, which in turn placed women's rights in conflict with the rights of the unborn. Similarly, the second conflict that was apparent in the 1992 referenda was the tension between the rights of a child or teenager and the rights of the unborn, especially if that child/teenager became pregnant against her will and was suicidal as a result. The final conflict that was illuminated by the 1992 referenda surrounded the issue of nationalism and the act of Irish women travelling outside of Ireland, and more specifically to the U.K., for an abortion.

In total, three referendum questions were asked at the same time, on November 25, 1992. The results of the first two 1992 referenda (the Thirteenth and Fourteenth Amendments) were that a woman's right to travel freely to countries where abortions are legally performed would not be infringed by Ireland's ban on abortions and finally, women were to be allowed to pursue information on abortion services in foreign countries including the U.K. and EU member states (Mullally, 2005). The official results of the referenda were that 62 percent of those who voted did so in favour of protecting a woman's right to travel, even to countries that performed abortions. 37 percent voted against her right to travel (Referendum Results, 1937-2011, p.46). With regard to the right to information on abortion services, the Irish people voted 60 percent in favour and 40 percent against (Referendum Results, 1937-2011, p. 48).

The third referendum held in 1992 asked Irish citizens to vote on the proposed Twelfth Amendment, which would ultimately outline under what circumstances a legal

abortion could take place in Ireland, following the Court's ruling in *X* that in some cases, such as if a woman's life was at risk, an abortion could be permitted. The purpose for the Twelfth Amendment was to create a constitutional ban on threat of suicide as grounds for an abortion. This amendment failed to garner sufficient support and, as a result did not pass. Consequently the threat of committing suicide remained legal grounds for receiving an abortion under Irish law (Mullally, 2005). The results were similar to the other two referenda , with support split 65 percent against the amendment and 35 percent in favour (Referendum Results, 1937-2011, p. 44).

In summary, the overall results of these referenda, as mentioned above, were that a woman's right to travel and to access abortion-related information were constitutionally protected. So too was the threat of suicide as a grounds for legal abortion (Thirteenth Amendment to the Constitution Act, No 13, 1992). Ultimately, the three referenda represented an important shift, though not an overhaul of abortion policy in Ireland. The Irish public, despite their generally conservative leanings on abortion, adapted reproductive policy over time to reflect changing circumstances and public outcry, again signifying a "conversion" of policy according to Hacker's (2005) typology.

In light of the above mentioned referenda which took place as a direct response to the *X* case, it is clear that in 1992 a significant change occurred in Ireland surrounding the topic of abortion. The *X* case's framing of the rights of a living child (who was pregnant via rape at 14 years old) versus the rights of a potential child (her fetus) placed the Irish people in an incredibly difficult moral position, further illuminating the complicated nature of abortion law itself. If the Irish government were to have remained unwavering on its outright ban on abortion, it would essentially have forced a young girl to continue

with a pregnancy and due to the threat of suicide, potentially risk her life in the process. On the other hand, as history has illustrated, the Irish people displayed a sort of liberalization of opinion on abortion by ensuring that pregnant women are able to travel to receive information on abortion, as well as actual abortions themselves. The reality, then, is that the rape of a 14-year-old girl ultimately provided pro-choice advocates an important opportunity to advance (and secure) some degree of liberalization around reproductive rights in Ireland, with the goal of avoiding another tragic situation such as X's.

Following the *X* case, in November of 1997 a thirteen-year-old girl, who would be known publically only as "C," sought a legal abortion as she, too, had become pregnant as a result of rape. In the case of "C," the pregnant young woman was in the care of the Eastern Health Board and it was her parents who objected to her travelling to England to obtain an abortion (*A & B v. Eastern Health Board & C*, 1997; Mahon, 2001). Her parents thus called for an injunction prohibiting "C" from travelling to England for an abortion.

The case was heard by Justice Geoghegan, who ruled that "C" could travel to England without legal impediment; however, he added: "The amended Constitution does not now confer a right to abortion outside of Ireland. It merely prevents injunctions against travelling for that purpose" (Irish Times, 2010). In short, what she did while in England was her own business, and the case was decided largely in regard to one's freedom to travel and divorced from a meaningful discussion of one's right to obtain an abortion and the problems of limiting that right. Here the Irish Court once again clearly

states that a pregnant woman may travel and do what she wishes while abroad, thus in some ways legalizing the right to obtain an abortion abroad.

Like most other victories for the Irish pro-choice movement, the decision on C reflects a "conversion" of policy (Hacker, 2005). The court, in this case, mandated that the state adapt its current policy in light of freedom to travel, and the broader issue of abortion rights (and the potential result of the elimination of current policy) was avoided. In 1998 the Irish Government formed the Inter-Departmental Working Group on Abortion and in September of 1999 the Green Paper on Abortion was presented. This ban on travel illustrated just how restrictive Ireland was against pregnant women as the act of travelling while pregnant signified the possibility of abortion and thus had to be prevented.

The Green Paper on Abortion contained seven possible options to resolve the debate over when an abortion was legally permitted in Ireland. Representing a wide-array of positions, the Green Paper discussed the following options: a) An absolute constitutional ban on abortion; b) An amendment of the constitutional provisions so as to restrict the application of the *X* case; c) The retention of the status quo; d) The retention of the constitutional status quo with legislative restatement of the prohibition on abortion; e) Legislation to regulate abortion in circumstances defined by the *X* case; f) A reversion to the position as it pertained prior to 1983; and g) Permitting abortion on grounds beyond those specified in the *X* case (Irish Times, 2010).

Upon presentation of these seven options during May, June and July of 1999 interest groups, medical professionals and other interested parties were invited to present opinions to the All-Party Oireachtas Committee. In November, the Committee published

its results which, due to an inability to reach a consensus, eventually included three options. The first option was presented by the conservative and highly nationalist Fianna Fáil party, who recommended that the X judgement should be restricted and a referendum should be held in hopes of an absolute ban on abortion (Mahon, 2001). The second option came from the right-centre Fine Gael party, who argued in favour of the maintenance of the legal status quo with regard to abortion but with the addition of state support for women experiencing crisis pregnancies. In such an instance, state support would include assisting women in obtaining abortions in England while maintaining a prohibition on abortion within Ireland. The final option was presented by the centre-left Labour party, who argued that "legislation as prescribed by the X case judgement should be introduced" (Mahon, 2001, p. 176).

After consideration of these three options, the Taoiseach (the head of the Irish government) announced that he would hold a referendum to ask the Irish public if they would support legislation allowing abortion in cases where a woman's life is at risk, but not necessarily where suicide is threatened. This option most closely represented the proposal championed by Fianna Fáil, which, at the time, was the main partner in a governing coalition.

The Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy Bill, 2001) was narrowly rejected by a 50.42% to 49.58% margin (representing just less than 11 000 votes) in 2002. The Amendment sought to remove the threat of suicide as grounds for a legal abortion, as well as introduce a stiffer penalty (of up to 12 years) for those found guilty of performing an illegal abortion. The Amendment would have also defined abortion as the destruction of unborn life after implantation in

the womb, but would have still permitted abortion where necessary to prevent loss of life (other than by suicide), and also maintained that the right to freedom of travel to obtain an abortion would not have been affected. As is mentioned above, as the 25th Amendment ultimately failed, the risk of suicide was maintained as viable grounds for granting an abortion in Ireland. This represented a defensive victory for the pro-choice movement. While nothing was gained (and there was no potential for gain), the important thing for pro-choice advocates is that nothing was lost. In a conservative environment such as Ireland's, maintaining the small degree of liberalization that existed was important for the pro-choice movement.

As the history of abortion legislation in Ireland suggests, abortion has remained, and still remains, a highly political issue. More importantly, the results of the 2002 referendum suggest that Irish public opinion on abortion may be changing to allow for abortion in certain circumstances. Although the threat of suicide is an extreme reason for allowing an abortion and one would hope that abortion could be permitted on less drastic circumstances, the very fact that the Irish people consider abortion legal in any instance is telling of a minor level of change in Ireland, one which began shortly after the *X* case, once again illustrating the important opportunity brought about by an otherwise sad situation.

It is also interesting to juxtapose the relationship between Catholicism, abortion and the threat of suicide alongside each other. As it is explained in a Catechism of the Catholic Church, "Suicide contradicts the natural inclination of the human being to preserve and perpetuate his life. It is gravely contrary to the just love of self. It likewise offends love of neighbour because it unjustly breaks the ties of solidarity with family,

nation, and other human societies to which we continue to have obligations. Suicide is contrary to love for the living God" (Catechism of the Catholic Church, Para. 2280-2283). As the above statement of the Catholic Church explains, the act of suicide is itself a sin. Thus, when faced with the choice between allowing abortion or suicide, as the case of Ireland illustrates, the state and the people have chosen to allow for abortion instead of suicide. All of this is to suggest that for some, there are worse sins in Ireland than to obtain an abortion. The Catholic Church's specific opinion on abortion is discussed further in Chapter six.

Irish Abortion Law and the ECJ and ECHR

In 2005, another challenge to Ireland's abortion laws was launched by "D," who claimed that "her inability to obtain an abortion in Ireland was a breach of her human rights" (*D. v. Ireland*, 2005). "D" travelled privately to Britain for an abortion after she discovered that, at fourteen weeks pregnant, one of the twins she was carrying had died and the remaining one had Trisomy 18, a lethal fetal abnormality. After travelling to Britain to obtain an abortion, "D" sought legal counsel and brought her case before the ECHR, arguing that as a result of a lack of safe and legal abortion access in Ireland, and by extension having no meaningful option to but to travel abroad to obtain an abortion her human rights had been violated. With the goal of maintaining confidentiality, "D" chose to take her case to the ECHR, rather than Irish Courts (*D. v. Ireland*, 2005). In 2006, the ECHR refused to hear "D's" case, on the grounds that "the applicant had not exhausted domestic remedies by bringing the case to the Irish Courts" (Report of the Expert Group on the Judgement in *A, B & C v. Ireland*, 2012).

In 2007, another case concerning a woman pregnant with a fetus suffering from a life threatening abnormality presented itself, this time before Irish courts. In the case of *Miss D v. District Judge, HSE, Ireland and Attorney General*, Miss D, a pregnant 17 year-old from Ireland brought a case against the Health Service Executive (HSE) when it attempted to prevent her from travelling to Britain to obtain an abortion. At four months pregnant, Miss D discovered that her fetus had anencephaly, a neural tube defect causing the absence of a large portion of the skull and brain, which is usually fatal within three days after birth. At the time, Miss D had been in the care of HSE, who refused to allow her to leave the state to have an abortion. Miss D was told "that the HSE had notified the Gardaí [the Irish police] that she was not permitted to leave the state" (Miss D v. Ireland and others, 2007). It should also be noted that unlike the complainant X from 1992, Miss D was not considered suicidal, but rather was emotionally upset. After hearing Miss D's case, the Court ruled that:

> There was no law or constitutional impediment preventing Miss D from travelling for the purpose of terminating the pregnancy, and said that the actions of the HSE social worker in telling the Gardai that Miss D must be prevented from travelling were without foundation in law (*Miss D v. Ireland and others,* 2007).

Although the Court upheld Miss D's right to travel to obtain an abortion, the issue of the possibility of Miss D receiving an abortion in Ireland was not discussed. While important, this decision maintained the status quo, but didn't allow an opportunity for pro-choice forces to move the agenda forward. Thus, this case further illustrates Ireland's decision to 'turn a blind eye' to the problem of Ireland's current position on abortion by forcing women to travel abroad to terminate their pregnancies.

In light of the above mentioned referenda as well as legal battles, with the passing of s.40 (3)(3)'s unwavering right to life of the unborn, the Irish state created a law which has not proven to be acceptable to the majority of Irish people. Beginning with the X case, it is evident that Ireland's outright ban on abortion has not been successful and indeed, there are circumstances where the Irish people believe that abortion should be permitted. Questions as to when an abortion should be legally permitted in Ireland were not settled in the aftermath of *X*, and in fact very similar questions were raised in 2010 in the case *A, B and C v. Ireland*, in which three Irish women challenged Ireland's abortion law before the European Court of Human Rights (ECHR).

In *A, B and C v. Ireland*, three women challenged Ireland's prohibition on abortion and argued that it violated their human rights under articles 2, 3, 8 and 14 of the European Convention on Human Rights. The first woman, who is referred to as 'A,' is a former alcoholic with four children already living in foster care, who sought an abortion because she feared that giving birth to another child would jeopardize her chances of re-gaining custody of her existing children. The second woman, 'B,' became pregnant when her morning after pill failed (Ryan et al., 2012). She was warned by two physicians that she was likely experiencing an ectopic pregnancy (which can be potentially life-threatening) and also sought an abortion in the U.K.. The third applicant, 'C,' was in remission from cancer when she learned of her pregnancy, and was informed that her pregnancy could cause a relapse of her cancer, and therefore decided to travel to the U.K. to obtain an abortion.

Upon return to Ireland, all three women experienced complications after their abortions, all of which could have been prevented if it were not for Ireland's firm

restrictions on abortion access (*A, B and C v. Ireland*, 2010). Particularly, these women would not have had to travel abroad causing time delays, the stress of travel as well as the financial burden of travel, as well as having to pay for an abortion in England.

When A, B and C brought their case before the ECHR, they argued that:

> The restriction on abortion stigmatised and humiliated them and risked damaging their health in breach of Article 3… under article 8, the national law on abortion is not sufficiently clear and precise. It was also claimed that the restriction was discriminatory and in breach of article 14 in that it placed an unnecessary burden on them, as women… C complained that the restriction on abortion and the lack of any clear legislation or guidelines regarding the circumstances in which a woman may have a lawful abortion to save her life were a barrier to her obtaining proper medical advice and treatment, and infringed upon her right to life under article 2 of the convention (*A, B and C v. Ireland*, 2010).

On December 16, 2010 the ECHR found that with regard to the case, the claims made by applicants A and B would not be heard as the court found that they had "sought abortions for reasons of health and/or wellbeing" (Ryan et al. 2012, p. 16). As Irish law allows pregnant women to travel to obtain abortions, as well as to access information, "the Court did not consider that the prohibition on abortion in Ireland for reasons of health and/or wellbeing exceeded the margin of appreciation accorded to Member States, and struck a fair balance between the privacy rights of A and B, and the rights invoked on behalf of the unborn" (Ryan et al. 2012, p.40).

With regard to applicant C, the Court found that there had indeed been a violation of her rights under article 8 as there was not a procedure by which she could have legally obtained an abortion in Ireland, despite the fact that it was the pregnancy causing a threat to her life. Thus the Court concluded that:

> The authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of

> the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which C could have established whether she qualified for a lawful abortion in Ireland in accordance with article 40(3)(3) of the Constitution (*A, B and C v. Ireland*, 2012, para. 267).

While this decision made a ruling against the prevailing legislation in Ireland, it did not change or otherwise amend it. Nevertheless, the ruling against Ireland provided some sort of opportunity for pro-choice groups to bring about a change to abortion access. In the words of Shannon K. Calt, this case has the potential to become Europe's version of *Roe v. Wade* (2010, p. 1189). In response to the ECHR's judgement in *A, B and C v. Ireland* an expert group, chaired by Irish Justice Sean Ryan, was formed to address the question of how and when an abortion may be obtained in Ireland where pregnancy causes a threat to a woman's life.

In November 2012, nearly two years after the ECHR's ruling in *A, B and C v. Ireland*, the Expert Group released its report offering four options for abortion law reform, these were condensed from the seven presented in the Green paper. The options presented in 2012 focused more on procedure than those contained in the earlier Green paper, and were also more liberal, in the sense that they recognized a clear need to permit and regulate abortion in at least some instances, however limited, to be consistent with the ruling in *A, B and C,* and also the much earlier ruling in *X*. Consequently, there was not an appetite for options such as an absolute constitutional ban on abortion, which was proposed by Fianna Fáil in the green paper.

The first option entailed the introduction of guidelines for legal abortion which would not require primary legislation. This option was considered undesirable by the Expert Group as it would not satisfy Ireland's obligations for abortion reform before the

Council of Europe. The second option called for regulations controlled by the Minister of Health who would allow for abortions in pregnancies where the mother's life was at risk. The disadvantage to this option is that "Ministers could not issue regulations without being given the power to do so by enabling legislation, and therefore it is not likely to prove a speedier or superior solution that the other legislative options" (Ryan et al. 2012, p.46).

The third option suggested abortion reform through legislation alone, thus allowing the Oireachtas (The Irish Legislature) to discuss and vote on each element of the legislation. The most significant disadvantage to this option was that it would take a great deal of time for abortion legislation to be agreed upon by the Oireschtas and the legislation itself may become quite rigid. The fourth option, which was supported by the Irish cabinet in early December 2012, was to create new legislation as well as regulations surrounding women's access to abortion. The purpose for including regulations is that they can be amended relatively easily, however the initial drafting of abortion legislation may still take quite some time before the Oireschtas.

The cabinet explained that they will respond to *A, B and C v. Ireland* by creating both legislation and regulations which will "give effect to the 1992 *X* case judgement, [which] held that abortion was permissible where there was a real and substantial risk to the life of the mother, as distinct to her health. Such a risk included the threat of suicide" (Irish Times, "Abortion Debate Worrying", 2012). Again, we see "conversion" of existing policy, this time by the legislature directly, which has elected to adapt policy in a very narrow fashion (and even then, only when their hand is forced).

Irish Abortion Law at Present

In July, 2013, the Irish Oireachtas approved the passage of *the Protection of Life During Pregnancy Bill*, which ultimately creates the guidelines necessary for a woman whose life is at risk as a result of pregnancy to obtain an abortion (Humphreys, 2013). On July 30, 2013 the *Protection of Life During Pregnancy Act* was officially passed into Irish Law by President Michael Higgins, repealing s.58 and s.59 of the *Offences Against the Person Act, 1861*. (Roche, 2013). Specifically, the *Act* reintegrates Ireland's ban on abortion while at the same time outlining the course of action to be taken in the rare circumstance that an abortion is required to save a woman's life.

The formal guidelines to be followed by women seeking abortions in Ireland are found in s.7 of the *Protection of Life During Pregnancy Act* (2013) which states:

> It shall be lawful to carry out a medical procedure in respect of a pregnant woman in accordance with this section in the course of which, or as a result of which, an unborn human life is ended where: the medical procedure is carried out by an obstetrician at an appropriate institution, and subject to section 19, two medical practitioners, having examined the pregnant woman, have jointly certified in good faith that i) there is a real and substantial risk of loss of the woman's life from a physical illness, and ii)in their reasonable opinion, that risk can only be averted by carrying out that medical procedure.

With regard to the threat of suicide, s. 9 states:

> It shall be lawful to carry out a medical procedure in respect of a pregnant woman in accordance with this section in the course of which, or as a result of which, an unborn human life is ended where the medical procedure is carried out by an obstetrician at an appropriate institution, subject to section 19, three medical practitioners, having examined the pregnant woman, have jointly certified in good faith that i) there is a real and substantial risk of loss of the woman's life by way of suicide, and ii) in their reasonable opinion, that risk can only be averted by carrying out that medical procedure. Of the 3 medical practitioners referred to in subsection (1) one shall be an obstetrician who practises as such at an appropriate institution, one shall be a psychiatrist who practises as such at an appropriate institution, and one

> shall be a psychiatrist who practises as such at an approved centre, or for, or on behalf of, the Executive, or both.

Section 19 of the *Act* (2013) outlines the fact that a certification is required before a woman obtains an abortion which must be "made in the prescribed form and matter and must contain the prescribed information (which may include the clinical grounds for carrying out the medical procedure to which the certification relates)." The current punishment for a woman who procures an abortion illegally without following the guidelines of the *Protection of Life During Pregnancy Act* (2013) is now up to fourteen years in prison.

On August 23rd, 2013 the first legal abortion was performed in Ireland. In this instance a woman, whose life was at risk, was permitted to abort her 18 week unviable fetus (McDonald, 2013). On January 1, 2014 the *Protection of Life During Pregnancy Act* was became official law in Ireland. During the summer of 2014, in the wake of the very public coverage of Saviatta Halaperna's death, the United Nations Human Rights Committee publicly criticized Ireland's current laws and practices relating to reproductive rights, urging them to liberalize. In August of 2014 it became clear that although in theory (and to some extent legally) Ireland had begun a journey towards liberalizing their abortion laws, in practice abortion remained nearly impossible to obtain.

During the spring and early summer of 2014, a young woman known as "Miss Y" attempted to obtain an abortion on the grounds that she was indeed suicidal (as a result of her pregnancy from rape). This was the first case in which the *Protection of Life During Pregnancy Act* was considered. Although Miss Y sought her abortion in the first few weeks of her pregnancy she was deterred from the procedure until at nearly 25 weeks pregnant she went on a hunger strike (illustrating her suicidal state of mind)(Valenti,

2014). Once on her hunger strike, it was ordered that Miss Y be re-hydrated and a caesarian section was performed, delivering a live child. As the outcome of Miss Y's case illustrates, although at first glance, abortion law has been somewhat liberalized, in practice, abortion remains nearly impossible to legally obtain in Ireland, not to mention a host of other rights violations that occur when a women pressures the state for a legal abortion.

In light of the above outlined history of reproductive rights legislation (and attempted legislation) and litigation, it is clear that many central themes run throughout much of the discourse on reproductive rights in Ireland, namely: Catholicism, nationalism, the role of interest groups and the relationship between Ireland and surrounding states. As a state inhabited by a predominantly Catholic population, it could be argued that restrictions on abortion and reproductive rights access in Ireland could largely be attributed to both a strong sense of nationalism as well as Catholicism. If it is accepted that Ireland's laws on abortion access remain limited due to its Catholic and nationalist population, then an interesting paradox presents itself when Quebec, another largely Catholic and nationalist population is directly compared with Ireland.

The Irish case also points to a perplexing form of nationalism, where abortion is said to be prohibited often on grounds of Irish nationalism, while it is publicly known that Irish women travel to the U.K. to obtain abortions. Is nationalism truly a valid justification for Ireland's restrictive stance toward abortion if the state is fully aware that Irish women are travelling overseas, especially to the U.K. to obtain abortions? This acti of "looking the other way," thus forcing women to seek abortions overseas, seems counterintuitive to a nationalist project that seeks to produce more Irish citizens.

This history of abortion also highlights several interesting tensions, particularly those caused by constitutional entrenchment of the fetal right to life. More specifically, the case of Ireland illustrates a tension between the rights of a mother versus the rights of a fetus, and also, in the cases of *X*, *C* and *Miss D* the rights of a living child versus an unborn fetus.

Moreover, as the recent events of July 2013 and August 2014 illustrate, abortion may now be permissible in Ireland, albeit under limited circumstances. This raises the question, while in theory Irish law has been modified to allow for abortion in rare circumstances, in practice will abortion access change for Irish women? As Dr. Mary Favier argues, "in some respects nothing much had changed for Irish women on foot of the recent legislation as she argued that it will continue to be difficult for a woman whose health is at risk to get an abortion" (Roche, 2013). As the Canadian case illustrates, the institution of medical/supervisory committee approval prior to obtaining an abortion does not necessarily make the procedure accessible to women. Indeed, as the case of Miss Y illustrates, the creation of this type of gate-keeping position can often hinder a woman's ability to exercise her autonomy via reproductive rights procedures.

Chapter 4: History of Abortion Law in Quebec

> By fighting for reproductive freedom, and making it possible, I have made a contribution to a safer and more caring society where people have a greater opportunity to realize their full potential…Well-loved children grow into adults who do not build concentration camps, do not rape and do not murder (Morgentaler, 2005, cited in CBC, 2013).

For Dr. Henry Morgentaler, the quest for greater abortion access was both a personal as well as political project. As I explain below, Morgentaler's achievements would not have been possible without the necessary political opportunities for change. In contrast to Ireland, where until recently, abortion had been categorically outlawed, women in Quebec had limited access to abortion between the 1960s and 1988, and considerably expanded (yet still not universal) access beginning in 1988[6]. As the legal history of abortion in Quebec illustrates, the struggle for reproductive rights has been a long and tumultuous journey, one which includes some key figures and structures in Canadian history, including women's groups, the Canadian Medical Association (CMA), Canadian Bar Association (CBA), Dr. Henry Morgentaler and some of the Supreme Court Justices who presided over his 1988 case.

More importantly, however, is the role played by institutions, and particularly the development of a new one – the *Canadian Charter of Rights and Freedoms* – in 1982, which provided the pro-choice movement (and key figures within it) a new opportunity to seize in the advancement of reproductive rights in Canada. The entrenchment of the *Charter*, for the pro-choice movement, represented another major institutional opportunity to challenge a law, and one that they keenly incorporated into their

[6] See appendix 2 for a timeline of reproductive rights in Canada.

repertoire. One cannot fully understand the role of political institutions in Quebec, however, independent of the system of federalism that is in place.

Situating Quebec in a Federal State

Melissa Haussman (2005) and Howard A. Palley (2006) offer a detailed outlines of the history of abortion access in Canada more generally, discussing the role of both anti-choice and pro-choice interest groups. While Palley's work is largely descriptive and does not include a great deal of analytic discussion, Haussman's book offers an approach which is quite critical of Canada's limited access to abortion rights services. While Haussman compares abortion rights access throughout North America, her works represents a detailed discussion of the impact of federalism on abortion access in Quebec, illuminating the many weaknesses in the current system of abortion rights protection, emphasizing the unwillingness of many provinces to classify abortion as a medically necessary service under the Canada Health Act. Thus, Haussman (2005) concludes that while abortion may be available in many cases for women "who have the advantages of time, money, providers and geographical location…" abortion access is far from universally available (p. 185). Access to abortion in Quebec is dependent on numerous factors, including the relationships between Quebec and the federal government.

Although Quebec has a distinct language, sense of nationalism, and (historically) religion, it shares something in common with Canada's nine English-speaking provinces: membership in a federal state. Malcolmson and Myers have defined federalism as a system of government in which "sovereign authority is constitutionally divided between two levels of government. This means that neither level of government can be understood

to have absolute sovereign authority (2009: 59). For Quebec, this means that its area of influence and control is limited in certain areas. Like all the provinces, its legislative jurisdiction is limited by certain laws passed by the federal government (which fall outside the jurisdiction of provincial governments, such as criminal law). Malcolmson and Myers continue that Canada's constitution, which Quebec is subject to, "gives legal jurisdiction over matters of national concern to the national government and matters of local or regional concern to the provincial…government" (2009: 59). Practically speaking, while health care (including access to abortion) falls under provincial jurisdiction, a portion of the funding for health care often comes from the federal government (although provinces may choose to refuse such funding and/or fund their programs independently) . Moreover, criminal law – which includes the criminal regulation of abortion – falls under federal jurisdiction.

In the early 1970s, when abortion access in Quebec was far more liberal than it was in the rest of Canada, Quebec was a site of resistance against the supposed influence of the federal government. As Milne notes, "Quebec is a unique site for assessing these contributions [of militant feminists] as abortion became part of the province's agenda against federalism and the promotion of a new secular nationalism as early as 1976. The provincial government permitted the practice of abortion despite the regulations of the Criminal Code" (2011: 4). Later on, however, the Supreme Court of Canada would strike down the restrictive legislation governing the process for legal abortions in Canada.

Through its financial superior position, the federal government has also been able to exert its influence in areas of provincial jurisdiction, such as health care. A prime example of this was the passage of the *Canada Health Act* in 1984, which effectively

allowed the federal government to influence provincial health policy (Dyck, 2009: 293). Similarly, the federal government also provides the provinces with considerable sums of money in the form of transfer payments to help offset the costs of provincially run services. In recent years, this sum has totalled over $50 billion (Mintz et. al, 2011: 363). This allows the federal government considerable leeway over provincial policy, and in the case of the *Canada Health Act*, a portion of transfer monies can be withheld for provinces who fail to follow its conditions (although the Federal government rarely uses this authority).

Another important area of federal influence over Quebec, and especially relevant for an analysis of reproductive, is the legal system. Canada has a unified legal structure, meaning that a single, hierarchically structured court system hears cases involving both federal and provincial laws (Mintz et. al, 2011: 475). The Supreme Court of Canada sits atop this system, and its members, like the members of provincial superior courts, are appointed by the federal government. Effectively, the entire appellate division is appointed and paid for by the federal government, and able to determine the constitutionality of both provincial and federal legislation, striking sections of unconstitutional legislation down if necessary. As a result of the unified structure, precedence from other provinces is seen to apply in Quebec (and vice versa), once the Supreme Court has presided over and decided upon an issue.

In regard to abortion, the Supreme Court of Canada struck down s. 251 of the federal *Criminal Code of Canada*, which severely limited the availability of abortions, in 1988. This principle was then applied to Quebec, long after it had already moved forward with effectively legalizing abortion through the absence of prosecution in the

mid-1970s. It was possible for Quebec to have moved forward with providing access to abortion, despite its illegality under federal law, because the administration of justice falls under provincial jurisdiction. For the provinces, this includes "the establishment and maintenance of police forces, the power to lay charges, and the right to prosecute offenses," as well as criminal prosecutions (Monahan, 2002: 331).

In these three ways – criminal law, transfer payments, and the court system – the federal government has the power to limit the jurisdiction and sovereignty of the Quebec government. Though sovereign in certain areas, the reach of the federal government as it relates to the legality of abortion, and to a lesser degree the provision of its services, effectively subjugates the Quebec government to the sovereignty of another government body, thus limiting the scope of possible action – or more bluntly, sovereignty – of the Quebec government.

In many respects, the limits on governmental jurisdiction experienced by Quebec as a result of Canada's federal system see it share many parallels with Ireland, whose government's jurisdiction is similarly limited by its membership in the European Union, most notably through decisions of the European Convention on Human Rights, the European Court of Human Rights and the European Court of Justice. In both cases, these external bodies have liberalized abortion law, but with different receptions. In Quebec, which has long had a liberal outlook toward abortion, the Supreme Court's decision in Morgentaler was not opposed, whereas the impact of membership in various European institutions, including the European Union has had a liberalizing thrust upon abortion law in Ireland, much to the chagrin – and in some cases – the outright opposition of the Irish state. Prior to the Supreme Court's decision in Morgentaler, however, access to abortion

– which had long been more liberal in Quebec to begin with – was a site of resistance against the federal government.

Political Change in Canada

Far from being a static construct, law, like any institution, is – as Streeck and Thelen (2005, p. 6) aptly note – a "dynamic political process" and one that is malleable, highly contested and potentially divisive (2005, p. 6). In the area of reproductive rights, this is especially true. In both Ireland and Quebec, the laws around reproductive rights and access to abortions have been constantly shifting, in many cases, as a result of courts whose jurisdiction falls under another sovereign authority. When the Supreme Court struck down a restrictive part of the *Criminal Code* in 1988 and Parliament failed to pass new legislation, a formal law ceased to exist. Informally, restrictions remain, using moral judgement by doctors at least over legal abortions. As this dissertation notes, there are a variety of reasons for this liberalization, but the important role played by the women's movement is central among them. This raises two important questions, one more broad and theoretical, and the other more specific to the case at hand: 1) how are laws that apply in Quebec changed, and 2) how, and to what degree, did pro-choice movements in Quebec help to change these laws?

Political opportunity structure suggests that social movements played an important role in this change, and that there were varying opportunities or access points that helped to facilitate this change, as evidenced throughout this chapter. In a parliamentary democracy such as Quebec's, laws are passed (and repealed) by the legislative branch, at either the federal or provincial level, depending upon which level of

government has jurisdiction over the policy area. In criminal matters, for example, the federal government has jurisdiction, and the provincial government cannot change federal law. The provincial government, though, has jurisdiction to enforce the law (or not, as was the case with section 251 of the Criminal Code for many years).

At the federal level, where a bicameral parliament exists, the legislative branch consists of the elected Members of Parliament (MPs) and the appointed Senators, who generally defer to the elected MPs (Dyck, 2009: 357). In Quebec, at the provincial level, the legislative branch consists solely of the elected Members of the National Assembly, or MNAs. There is no Senate or upper house at the provincial level. In Canada's parliamentary system, the legislative branch is fused with the executive level, as the Prime Minister or Premier and his or her cabinet (the executive branch, tasked with the implementation of laws) are also elected MPs and simultaneously sit as members of the legislative and executive branch (Malcolmson and Myers, 2012: 42-43).

Until 1982 and the entrenchment of the *Canadian Charter of Rights and Freedoms*, the legislative branch was the sole law making in Quebec, at the federal level, and in the rest of the provinces. Those interested in policy change had limited opportunities to craft and amend public policy. Much of their attention was therefore focused on traditional lobbying efforts, in which social movements and other interested parties would need to convince enough Members of Parliament, who were themselves bound by the doctrine of party discipline, to support (or oppose) a legislative change. As a result, lobbying efforts were, and remain, as is the case in any parliamentary system, centered on the executive branch, which has the power to bind the members of the caucus to vote a certain way (Dyck, 2009: 363). Outside of large scale protest movements such

as the Aboriginal rights organizations, the anti-poverty movement, public sector trade unions, and the broader women's movement, which did not really take off until the 1960s, political change was effected almost exclusively by the legislature, who held the ultimate law-making power (Dyck, 2009: 233).

The growth of the women's movement in particular helped to put pressure on elected officials, helping to bring about a series of liberalizations to the regulation of abortion in 1969, when S.251 was added to the *Criminal Code of Canada* as part of the Omnibus reforms (Palley, 2006). This section "provided for limited legalization of abortion by stipulating that a woman could receive a hospital-based abortion if she obtained permission from a committee of three physicians" (Palley, 2006: 572). Prior to this point, all abortions were considered illegal under the *Criminal Code*.

The committee of physicians whose consent was required for a woman to obtain an abortion was henceforth known as a therapeutic abortion committee (TAC) (*Criminal Code of Canada R.S.C. 1970, C-34*, s.251). This does not suggest however that abortion was absent from political discourse in the years leading up to 1969. As will be described below, abortion discourses before 1969 certainly existed, and were often centred in the legal and medical communities (Jenson, 1992). As will be outlined below, the push to bring abortion discussions and regulations to the forefront of Canadian politics came largely from members of the CMA and CBA and by the 1970s was taken up by the larger women's movement (Jenson, 1992).

As noted above, procuring a miscarriage (abortion) at any stage of pregnancy had been illegal in England since *Lord Ellenborough's Act of 1803*, which prohibited abortion after quickening under the threat of criminal prosecution. The British law was extended

to Canada via various Offences Against the Person statutes until 1892 when the first federal *Criminal Code of Canada* continued the criminal prohibition of abortion.

Although historically abortion laws in both Ireland and Quebec were derived from the British, the path each case took in developing their own unique laws was quite different from each other. In Quebec, like Britain, abortion laws were liberalized in the 1960s, suggesting a similar liberal development. In Ireland, however, abortion law has remained highly restrictive for various reasons, and as this dissertation argues, the fact that abortion was legalized in England is, to some degree, one of them.

The CMA and CBA were motivated to publicly enter the abortion debate as both doctors and lawyers were witness to the horrific aftermath of 'backstreet abortions' performed by women themselves or by individuals with little or no medical training. While the CMA and CBA pushed for abortion law clarification and reform from both legal and medical perspectives (namely protecting women's health from a medical perspective), in 1963 the National Council of Women began to publicly support "more widely available abortions [because the current] law hurt women, in large part because it led to inequities" (Jenson, 1992, p. 31). According to the National Council of Women the ambiguity of abortion law was detrimental to women because it did not treat each woman as equal and instead placed a greater burden on women who for geographical or economic reasons could not access abortion.

Although technically illegal at this point, abortion was still performed in some areas, notably larger urban areas. Thus, despite being illegal, abortion was still accessible to women in or near areas where illegal abortions could be obtained, such as Montreal. Thus living in areas where abortion could not be easily obtained, such as rural areas and

smaller towns, were victims of geography and lacked access to the services that could be obtained by women in larger areas.

In the 1960s, many doctors were uncertain about the details about when an abortion could legally be performed. To avoid any uncertainty, many simply choose not to perform the operation at all. Thus, it was doctors, particularly the CMA and lawyers from the CBA who led the early stages of the campaigns for clarification of abortion law in Quebec (Jenson, 1992). As Jenson (1992) explains as doctors and lawyers were at the forefront of abortion regulation debates, "the voices of women who were the recipients of the most common type of abortion- the 'backstreet ones'- were marginalized in the debate" (p. 25) Jenson points out that, in the early 1960s women's voices were relatively absent from the abortion debate, as they for the most part, did not yet have access to the political structures necessary to launch a strong movement for change.

In opposition to the doctors and lawyers who argued in favour of clarification, in the early 1960s, members of the Catholic Church argued against any form of liberalization of abortion law (Jenson, 1992). However, the Catholic Church was, at this point, not really able to speak with a strong voice. Jenson (1992) explains,

> At the time the Church itself was experiencing social and doctrinal upheaval associated with the Vatican Council and the papacy of John XXIII. While Catholics themselves were debating doctrinal and social questions, their interventions in the public and Parliamentary discussions tended to reflect a certain hesitancy to promote traditional positions with complete enthusiasm (Jenson, 1992, p. 32).

At the federal level, Pearson's Liberal government notified Parliament that it intended to address abortion reform in 1967. During this time, three private members' bills were presented to Parliament. The first two (Bill C-122 and Bill C-136), were generally seen as more ambitious in nature, and were introduced by members of the NDP. The third, Bill

C-40 introduced by Liberal MP Ian Wahn, was far less ambitious than those of the New Democrats and was seen as more of a "straightforward proposal" designed to clarify the parameters of legalized abortion through TACs (Jenson, 1992, p. 33). It sought to legalize abortion with the approval of a TAC, but only in cases in which a woman's life or health was threatened.

These bills were debated by the Standing Committee on Health and Welfare, though the two more moderate bills, C-40 and C-122, received far more attention that Bill C-136. Bill C-122, proposed by NDP MP Grace MacInnis, was remarkably similar to the resolution of the CMA. It called for legalized abortion "in the case of grave danger to the physical or mental health of the woman, a substantial risk that the foetus would be born disabled, or a pregnancy resulting from a sexual crime" (Jenson, 1992, p.33). While this Bill received more consideration than Bill C-136, it, as well as the recommendations of the CMA, was ultimately rejected by the Committee. When the government changed in 1968 from a Liberal minority lead by Pearson, to the Liberal majority under the three private members' bills on abortion fell (author unknown, abortionlaws.ca).

With the election of the Trudeau Liberals in 1968, the government announced that it would pursue omnibus reforms to the *Criminal Code* (Bill C-150) which, among other things, would recognize changing sexual practices and would include liberalized access to abortion. Bill C-150 maintained abortion regulations within the realm of criminal law and constructed it not as a positive right held by women, but as an act which could be regulated by the state (under a revised Section 251 of the *Criminal Code*) and governed by the medical community through the usage of TACs. In 1969 Bill C-150 was passed

into law and officially became known as *The Criminal Law Amendment Act of 1969* (Omnibus Bill, CBC, 2013).

As was noted above, the 1969 amendments to the Criminal Code allowed for legal abortions to be performed under the consent of TACs. The amendments of the existing criminal regulation of abortion in Canada can be best conceptualized as a "conversion" of policy (Hacker, 2005). While abortion remained an action regulated by the state and punishable under the *Criminal Code*, access to it – in some cases at least – was expanded, and a new protocol – the TACs – was put into place to determine if and when a woman could legally access the service. This represents an important adaptation of existing policy, rather than the creation of a new one or the elimination of an old one.

If we recall from the previous section on Ireland's abortion history, we should note that it was in 1968 that the *Abortion Act* legalized abortion in specific circumstances in the UK. In fact, the creation of TACs closely resembles the stipulation that the consent of two physicians is required for an abortion in the UK. Also, the justification for changing abortion laws is quite similar in both cases in that they are said to have been changed in order to prevent complications arising from illegal abortions, rather than to promote female autonomy.

What is most interesting about the period from 1960 to 1969 in Canadian abortion law is the fact that the push for reform did not come directly and solely from the women's movement, but rather, at least initially, from the legal and medical community. Thus, in Quebec, early abortion reform can be largely attributed to the actions of lawyers, doctors and parliamentarians, though this did help to identify some potential allies for the

more radical pro-choice movement that would soon arise, and provided early legal opportunities for liberalized abortion access.

In their arguments for reform, neither the CMA nor CBA emphasized the connection between women and their right to personal autonomy. Instead, the CMA and CBA focused solely on creating a system in which doctors could safely and legally perform abortions, if they were deemed necessary. As we will see in later chapters, this appears in stark contrast to Ireland where the women's movement's attempts at liberalizing abortion have historically been faced great resistance from the medical, legal and political community. In Ireland, there has consequently not been an alliance between the pro-choice movement and these groups of political and social elites. However, in both cases, we can see that a discourse around the question of women's autonomy was largely absent, although this would certainly change over the next few decades.

Dr. Morgentaler's Influence

Arguably the most influential individual in Quebec's abortion history, Dr. Henry Morgentaler was a Montreal based doctor who began advocating for a woman's right to choose in the 1960s. In 1967, speaking as a representative of the Humanist Fellowship of Montreal, Morgentler addressed MPs on the topic of abortion stating that, "This may sound revolutionary but it isn't. … Our position is that a woman should have a right to her body" (Morgentaler 1967, cited in Mahoney, 2013). Subsequently, he began performing (illegal) private abortions for women who approached him. In response to these illegal abortions, on June 1, 1970 Morgentaler's private abortion clinic was raided by Montreal Police and charges were laid against him, though his trial did not begin until

1973. Between 1970 and 1973 he continued carrying out abortions at his Montreal clinic (Mahoney, 2013).

Morgentaler claimed that there was uncertainty around the question of jurisdiction at this point, and therefore he was surprised by the raid on his clinic. Morgentaler explained that, "The Provincial government said it was a federal matter and the federal government said it was provincial. Instead of sending anyone here to inspect the clinic, they sent the police" (Morgentaler, as cited in Ambroziak, 1977, p. 1). This statement illustrates just how unsure politicians were about the abortion topic in Quebec. Neither the federal government nor the provincial government of Quebec wished to directly address the fact that Morgentaler was performing illegal abortions in his clinics. Instead of directly addressing abortion as a federal (criminal offence) or provincial (health care) issue politically, the Montreal police were asked to arrest Morgentaler and he was charged with 13 counts of performing illegal abortions. Ironically, however, this arrest would help to galvanize pro-choice forces and proved to be an important opportunity for mobilization of a growing movement that placed women's rights and women's autonomy at the forefront, helping to not only shift the discourse on abortion, but also eventually help to secure its legalization.

In 1973, Dr. Morgentaler claimed to have performed over 5,000 abortions for women in a private clinic without the consent of a TAC, and thus in violation of s. 251 (Palley, 2006, p. 571). It was not until November of 1973 that Morgentaler made his first appearance before the Quebec Court. The defence used by Morgentaler was one of necessity, arguing that he was performing abortions because they were medically necessary for women's health, either mental or physical, despite their illegality. As a

doctor, Morgentaler argued that he had a responsibility to do what was best for his patients and if an abortion was required, then he would perform one. On November 13, 1973 a jury found Morgentaler not guilty of any of the charges laid against him.

Over the course of the next decade, Morgentaler was tried before the Quebec Court on two more occasions (1975 and 1983) for violating the 1969 *Criminal Code*. In all three trials (1973, 1975 and 1983) he was acquitted by a jury of his peers (Palley, 2006). The very fact that Morgentaler was acquitted by numerous juries indicates that Quebec public opinion was generally supportive of his cause. However, the higher courts did not necessarily share this sentiment.

In 1974 the Quebec Liberal government charged Morgentaler and the court sentenced him to eighteen months in prison. In 1975, Morgentaler was once again acquitted at a trial by jury. On March 26, 1975, a year after his first acquittal, the Quebec Court of Appeal, overturned the jury's ruling, thus convicting Morgentaler of providing illegal abortions. He was sentenced to 18 months in prison which he began serving until he suffered a heart-attack, in June of that same year and was moved to a nursing home. While Morgentaler was serving his sentence, Jerome Choquette, the Quebec Minister of Justice under the provincial Liberal government, presented him with another charge of performing illegal abortions. According to Eleanor Wright Pelrine (1983), Choquette, an openly devout Catholic, had a strong interest in prosecuting Morgentaler, thus prompting him to charge him a second time.

One year later, Morgentaler appealed the Quebec Court of Appeals' decision before the Supreme Court of Canada. "During the trial which took place before a judge and jury, he admitted the act, but relied upon the common law defence of necessity and

the statutory defence found in s. 45 of the Criminal Code" (*Morgentaler v. The Queen*, 1976). The Supreme Court upheld the Quebec Court of Appeal's ruling, arguing that Morgentaler could not prove that performing abortions was medically necessary. More specifically the Supreme Court held, "Nothing was said to show that there was any evidence of an urgent necessity for effecting the abortion in disregard of s. 251 of the Criminal Code" (*Morgentaler v. The Queen*, 1976, para 618).

Since Morgentaler could not prove that performing abortions was 'urgently necessary' the Supreme Court found that he was in fact in violation of s.251's prohibition on abortion and that the Quebec Court of Appeal's had been correct in overturning the jury's acquittal of Morgentaler. With regard to the jury's decision the Supreme Court argued that, "the Court of Appeal was correct in holding that the trial judge erred in putting the defence of necessity before the jury as there was no evidence to support it" (*Morgentaler v. The Queen*, 1976, para 618).

In 1976 when the Liberal government in Quebec was replaced by the Parti Québécois, the new Justice Minister of Quebec, Marc-André Bédard, dropped all charges against Morgentaler, and he was freed from prison (Palley, 2006). It is important to note that it was the nationalist Parti Québécois that dropped the charges against Morgentaler. This appears in stark contrast to the case of Ireland where the state actively prohibits abortion. It furthermore illustrates at least a loose alliance between nationalist forces and the pro-choice women's movement. Bédard's decision to drop the charges against Morgentaler signified the beginning of a new era for abortion politics in Quebec. The election of the PQ proved to be an important political opportunity for Quebec's pro-choice movement, as the new government shared with it, or was at least open to, the

advancement of women's rights, particularly in regard to reproductive freedom and autonomy. This would certainly help to further secure the prevailing liberalization of abortion in Quebec.

Quebec's Justice Minister realized that juries were, generally, unwilling to convict Morgentaler for performing abortions. He took this to mean that Quebec public opinion was supportive of the existence of private abortion clinics. If juries of Morgentaler's peers, the Quebecois, were not opposed to private abortion clinics, then the government of Quebec would no longer pursue criminal charges against Morgentaler, even if these were, in legal terms, prohibited.

During the 1980s, Morgentaler proceeded to set up a number of clinics in other provinces, including Manitoba and Ontario, where he provided abortion services without the approval of TACs, While it was still technically illegal to offer abortions without the support of a TAC, there appeared to be little chance of prosecution. This decision to open private abortion clinics in Winnipeg and Toronto came at the request of women's interest groups such as Canadian Abortion Rights Action League (CARAL) and the OCAC (Ontario Coalition for Abortion Clinics), both of whom actively pursued Morgentaler, asking him to expand his clinics outside of Quebec.

The relationship between Morgentaler and groups such as CARAL and OCAC was mutually beneficial. Feminist groups needed a physician who would willingly open a private abortion clinic, thus challenging s.251's current ban on abortion. For his part, Dr. Morgentaler needed a place to open a clinic where it would be legally challenged. When Quebec ceased to prosecute him, Morgentaler effectively lost his leverage to change abortion law in the courts. Because this was his ultimate goal, he needed to act in

jurisdictions outside of Quebec. The natural time constraints of pregnancy made it nearly impossible for a pregnant woman herself to challenge the law. By the time a pregnant woman reached the Supreme Court of Canada, her request for an abortion may have been a moot point. This was confirmed in the case *Tremblay v. Daigle, 1989*, which will be discussed in greater detail later in this chapter.

To bring about change, feminists needed Morgentaler to spearhead the reproductive rights movement outside of just Quebec. If abortion laws were to change, Dr. Morgentaler would have to "stir the pot" elsewhere in order to have his day before the Supreme Court of Canada, and the chance to test the new *Charter of Rights*. By opening his clinic in Toronto, Ontario, Morgentaler provided an avenue for the feminist movement towards reproductive freedom and Morgentaler would soon gain the legal grounds necessary to challenge s.251 using the *Charter of Rights and Freedoms*.

This mutually beneficial relationship between Morgentaler and Canadian feminists, from both Quebec and Ontario, is something that was not experienced in Ireland. It provided the pro-choice movement in Quebec with an effective ally, as well as an important political opportunity to reform and liberalize Canadian abortion through the Supreme Court of Canada. This same opportunity was not available to the pro-choice movement in Ireland. Without a doctor who was willing to advocate for accessible abortions, who could become a figurehead for the reproductive rights movement, it was more difficult to access the political and legal institutions. In fact, it led Irish feminists to focus their attention on securing abortions outside of Ireland's borders. This lack of a figurehead in Ireland and its impacts on the Irish reproductive rights movement will be explored further in Chapter seven.

In 1983, along with Drs. Leslie Smoling and Robert Scott, Morgentaler opened his first abortion clinic in Toronto, Ontario. Shortly after its opening, the Toronto Morgentaler clinic was raided and Drs Smoling, Scott and Morgentaler were charged with procuring illegal miscarriages[7]. Once again, before a jury of their peers (this time in Ontario), Dr. Morgentaler, along with Dr. Smoling and Dr. Scott, were acquitted. It would seem that public opinion in Ontario, was also not in favour of laying criminal charges against Dr. Morgentaler for operating private abortion clinics. As will be discussed later in this dissertation, survey research suggests that the majority of Canadians feel that abortion should be allowed in only some circumstances but few are in favour of a total ban or complete legalization, which may help to explain - in part - the juries' decisions to acquit Morgentaler, despite the existence of a clear law that had criminalized his actions. The juries in Quebec and Ontario who heard Morgentaler's early cases seemed to represent the uncertainty around abortion law expressed by Canadian public opinion (Brodie, Jenson & Gavigan, 1992).

In 1982 the entrenchment of the *Charter of Rights and Freedoms* brought with it a new institutional opportunity for pro-choice groups to challenge the constitutionality of s.251's criminalization of abortions performed without the consent of TACs, and the legal face of this was Henry Morgentaler. This time, however, using the newly-entrenched *Charter*, he answered back that s.251 violated a woman's s.7 right to life, liberty and security of the person. In 1988, the Supreme Court of Canada was asked to determine if section 251 of the Criminal Code and its requirement that abortions be performed in hospitals at the consent of a Therapeutic Abortion Committee (TAC),

[7] The term illegal miscarriages was the formal legal terminology used in this case.

violated a woman's autonomous right to life, liberty and security of the person (as it is guaranteed by section 7 of the Charter of Rights and Freedoms).

Morgentaler's central argument against s.251 was that it violated individual liberty and security because it forced women to seek the consent of a TAC before obtaining an abortion (*R v. Morgentaler*, 1988). For Morgentaler – and most pro-choice advocates – the decision to maintain or end a pregnancy is an extremely personal one, one in which the state has no business regulating via TAC committees. State regulation, he asserted, was not only problematic for women, it was also in direct violation of their constitutional rights. It is interesting to note here, that there is no mention of the rights of the fetus in the Quebec discourse. Rather, in *Morgentaler*, the emphasis is on the rights of women to control their reproduction. This appears in stark contrast to the case of Ireland, where, as we saw earlier, the rights of the fetus are generally at the centre of abortion discussions.

The outcome of *R v. Morgentaler*, 1988 was that s.251 was deemed by the Supreme Court of Canada to have infringed a woman's right to security of the person, as well as her liberty, which encompasses a woman's right to control her own body (*R v. Morgentaler*, 1988). Specifically, the then Chief Justice Dickson argued that "delays of up to eight weeks exposed women to increasing physical risks and psychological upset" (*R v. Morgentaler*, 1988, para 79). The delays Justice Dickson referred to were often the result of long wait times for a woman to see a TAC. Taking a purely legalistic approach, Justice Beetz argued:

> Security of the person within the meaning of s. 7 of the Charter must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a pregnant woman whose life or health is

> in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, her right to security of the person has been violated (*R v. Morgentaler, 1988,* para 81).

As Justice Beetz' statement illustrates, the focus of the Judges was on the rights and safety of the pregnant woman. In Quebec (or elsewhere in Canada for that matter), there is not a recognition of a fetal right to life, thus the rights and health of the pregnant, rights bearing woman are paramount. However, even in this discourse, the focus remains on a woman's right to health, not her right to choose. In contrast to Ireland, where the focus of law makers was often the rights of the unborn, in Quebec, abortion debates are centred on the health, security and rights of women. Under the new *Charter*, the Court prioritized the rights of women over the rights of a fetus.

In agreement with Justices Dickson and Beetz, Justice Bertha Wilson, the only female Supreme Court Justice on the bench at the time, argued that s.251 in fact violated a woman's right to security of the person; however, Justice Wilson also argued that s.251 violated a woman's right to liberty, specifically her right to individual autonomy *(R v. Morgentaler*, 1988, para 163-164).

The two dissenting opinions in *R v. Morgentaler* 1988 came from Justices McIntyre and LaForest, who argued that there was no s.7 violation because Morgentaler himself was not facing a rights violation (*R v. Morgentaler*, 1988, para. 133-135). In other words, they ruled that only a woman seeking an abortion could challenge the law. Of course, the hierarchical structure of Canada's court system meant that a *Charter* challenge would take years to be heard by the Supreme Court of Canada, as it would first need to go through provincial courts and later the provincial appellate courts, making any case moot (as Tremblay would later confirm). McIntyre and LaForest also argued that the

Court should stick closely to the intentions of the drafters of the *Charter* when interpreting issues such as abortion, and were consequently unwilling to utilize s. 7 to strike down the mandated TACs (Weinrib, 1992).

It is clear that the *Charter* provided Quebec's pro-choice movement with an important opportunity to challenge the constitutionality of the *Criminal Code's* legal regulation of abortions. Further, the Supreme Court's decision to declare S.251 a violation of women's rights under section 7 of the Charter certainly had a positive impact on women's autonomy. After the Court's ruling, S.251 and its requirement that a woman consult with a TAC prior to obtaining an abortion were removed from the *Criminal Code*, thus allowing women to obtain an abortion at their request without legal regulations or delay, so long as a doctor was willing to perform one.

Thus, Morgentaler and other appellants from the case, including Dr. Scott and Dr. Smoling, were able to continue to set up private abortion clinics in various cities across Canada and perform abortions without fear of a criminal charge. It should be noted, however, that the decision to strike s.251 from the *Criminal Code* was not the final word on the abortion debate. While s.251 was removed from the *Criminal Code*, s.252 which forbids supplying drugs or instruments to assist in illegal abortions remains intact (Flanagan, 1997). As Thomas Flanagan (1997) points out, the significance of s.252 (now known as s. 288) is that it "reinforces the medical monopoly over abortion procedures and shows that regulation of abortion can survive in the Criminal Code" (p. 32).

Once the Supreme Court had found s.251 to be unconstitutional, it was then left to Parliament to decide what action – if any – would be taken by the federal government to either prohibit or protect abortion rights. While the Court ruled that the government's

current course of action – the criminalization of abortion through s. 251 of the *Criminal Code* – was unconstitutional, they also suggested that it was up to Parliament to determine if, or how, to proceed with the regulation of abortion. This provided the pro-life movement with another opportunity to secure some sort of regulation, but also provided the pro-choice movement with the opportunity for an explicit constitutional right to an abortion, or, at the very least, the opportunity to ensure that there would be no state regulation of abortion.

As part of their rulings in *R v. Morgentaler*, Justices Dickson, Beetz, Lamer and Estey argued that although s.251 was deemed unconstitutional, this did not imply that a right to abortion existed under the Charter (*R v. Morgentaler*, 1988). In short, following the Morgentaler decision, there was no law on the books regarding the legal regulation of abortion (save for the 'medical monopoly' under s. 252). As a result, there were no legal limitations on obtaining an abortion, but there was not an express right or guarantee of obtaining one when demanded. This created a legal vacuum regarding the legal regulation of abortion, and one which the federal government sought to re-regulate.

This situation, the absolute absence of public policy, is rare and can be best described using Hacker's terminology of policy change through "elimination" (2005, p. 48). The court indicated that this policy could be replaced, but as described below, this never occurred. The creation of a new institution - the *Charter* - provided an opportunity in which policy proved easy to convert, or in this case, eliminate outright, through legal provisions and the Court's understanding of liberty and security of the person. This sort of elimination proved fundamental to the expansion of safe and secure access to abortion in Quebec. A similar "elimination" has yet to occur in Ireland.

Under the government of then Prime Minister Brian Mulroney, the government declared that the Parliament would in fact attempt to create new legislation on abortion. In 1989, and again in 1991, the Mulroney government attempted to pass Bill C-43 which would make "abortion punishable by as much as two years in prison unless a doctor determined that continuing the pregnancy would threaten a woman's physical, mental or psychological health" (Bashevkin, 1996, p. 228; Pal, 1991, p.269-306).

The first attempt to pass Bill C-43 failed "when all options were defeated in a series of free votes in the House of Commons" (Flanagan, 1997, p. 32). Two years later, in 1991, Mulroney's government attempted again to pass Bill C-43; however, once the Bill reached the Canadian Senate, it failed to achieve a required simple majority vote and on January 31, 1991 it was defeated with a vote of 43-43 (Bashevkin, 1996). As Bill C-43 was left to a free vote in the House of Commons, its defeat was a result of a combination of partisan and moral beliefs held by individual senators, and certainly a victory for the women's movement in Quebec.

The failure of the Mulroney government to pass legislation on abortion and the tie vote in the Senate seem to suggest, that Canadians were divided on the issue of abortion. However, a Gallup poll taken on the issue of abortion in 1988 showed that, "20 per cent of respondents said that abortion should be legal under any circumstances, 13 per cent said that it should be illegal in all circumstances and 65 per cent said that it should be legal only under certain circumstances" (Cited in Brodie, Gavigan and Jenson, 1988, p. 78). In other words, 85 percent of Canadians felt that abortion should be legal in at least some circumstances, illustrating that public opinion was perhaps not as divided as some believed. For Flanagan, Mulroney's failed attempt to pass legislation on abortion

suggests that both the opinions of the House of Commons as well as public opinion are unclear where abortion is concerned. As Janine Brodie, Jane Jenson and Shelley Gavigan (1992) explain, as of 1992, "Approximately one quarter of Canadians agree that abortion should be legal under any circumstances, another 13% believe that it should be illegal under all circumstances and the vast majority think that abortion should be allowed in certain circumstances" (p. 61).

As the above mentioned statistics illustrate, in the late 1980s and early 1990s, popular opinion was that abortion should be permitted in at least some instances. In light of Parliament's inability to legislatively respond to Morgentaler early 1990s, it would seem that the Supreme Court's decision in *R v. Morgentaler,* and the resulting removal of their restrictions on abortion in the Criminal Code, was a victory for reproductive rights supporters. Parliament's inability to re-regulate reproductive freedom in the aftermath of *Morgentaler, 1988* means that the legal vacuum created by the Court's ruling in that case, remains the status quo.

Since 1982 with the entrenchment of the *Charter*, the Supreme Court (and those judges who compose it) has had a much larger role in law-making, particularly in the area of divisive social policy, such as reproductive rights. The existence of the *Charter*, a constitutional bill of rights, necessitates that all laws passed must be consistent with its provisions, and tasks the Supreme Court (in section 24) with ensuring this. For the pro-choice movement, this fact (and the opportunities provided by it) are best illustrated in *Morgentaler, 1988*.

After 1982, the Supreme Court of Canada was empowered to strike down laws passed by the legislative branch and implemented by the executive branch in the event

that the law, or any provision of it, is found to unreasonably violate someone's *Charter* rights. They can do this either immediately, or render it invalid but suspend the ruling for a period of time in an effort to give the legislative branch the opportunity to 'fix' the law in question. They are also afforded the power to 'read-in' a law, effectively adding something to its meaning or application. This has provided an important policy window (Meyer and Staggenborg, 1996), for the pro-choice movement to advance a liberalization of Canada's abortion policy by moving the debate outside the legislative branch and into the newly empowered judiciary.

Although these additional powers of the Court have been decried as the judicialization of politics (or the politicization of the judiciary) by some scholars, both on the right and on the left (for the left, see Mandel, 1994 and for the right, see Knopf and Morton, 2000), these developments have nevertheless made a new institution (the *Charter*) highly relevant to the social movements, and, by extension, made an existing institution (the Supreme Court) more relevant. These developments have also provided social movements, such as women's movement in general and the pro-choice movement in particular, with an important opportunity to try to have laws amended, or even crafted, in their favour.

Rainer Knopf and F.L. Morton (2000), for example, two conservative critics of the judicialization of politics that has occurred under the Charter, have identified pro-choice social movements as part of the 'Court Party,' a group who seeks policy change through the Courts and utilizes the *Charter* and the Court to bring about political change, thus circumventing the elected legislature (see also Brodie, 2002)**.** While critical of this strategy, which they see undercutting the traditional democratic process, the fact remains

that it has proven successful for advancing the causes of the pro-choice movement. Indeed, the entrenchment of the Charter represented an important political opportunity for women's groups to advance claims of justice on a variety of sensitive social issues, including but not limited to, reproductive rights. A variety of scholars, making empirical claims (Hein, 2001; Morton and Allen, 2001; MacIvor, 2013) as well as normative claims (Brodie 2001; Women's Legal Education and Action Fund, 1996), have all noted the proliferation of litigation from women's groups in the *Charter*-era, including litigation on pro-choice issues. Brodie (2001), for example, goes as far as calling women's groups a friend of the Court.

F.L. Morton and Avril Allen (2001) argue that while feminist groups have been active in the debate over reproduction in Canada, particularly before the Courts, a large number of cases in which feminists intervene does not equate with success. Furthermore, they assert that "legal victories do not automatically translate into policy victories" (Morton & Allen, 2001, p. 81). While Morton and Allen agree that *Morgentaler* was a significant victory for feminists in Canada, they remain sceptical about the overall power of legal success to foster change for feminist groups.

For Lori Hausegger and Troy Riddell (2004), the Court's ruling in *Morgentaler* signifies a dramatic turning point for the role of the Supreme Court in Canada as this was the first time that the Court had taken an active stance on an issue. Thus, with its ruling on *Morgentaler,* the Court began an era of judicial activism (by striking down the existing abortion law), which was followed by increased public interest in the Court, potentially bolstering its influence further. To be sure, the advent of the *Charter* did provide pro-choice advocates with a policy window and an opportunity to challenge

Canada's laws that did not previously exist, and it was one that they certainly utilized. That said, this legalistic strategy was conducted in conjunction with other, pre-existing strategies. While a constitutional bill of rights provided a certain trump card which was aggressively pursued, it was not the only strategy. In the battle over abortion, culminating in the successful *Charter* challenge in *R. v. Morgentaler*, Alexandra Dobrowolosky aptly notes that:

> Canadian feminists staged large-scale public events, coordinated coalitions of women's groups, unionists and other popular groups, plus forged alliances with the New Democratic Party, in addition to contesting abortion laws in courts. In other words, the women's movement adds an educative, provocative, mobilizing, social movement lawyer to the conventional interest group lobby (2000: 9).

While certainly utilizing the opportunities provided to it by the *Charter*, Canada's pro-choice movement remained active in traditional electoral politics and more contemporary forms of protest politics as well. This multi-faceted approach sought, ultimately successfully, to target as many institutions as possible in an effort to bring about social change. In so doing, the pro-choice movement, and women's movement in general, was also able to forge allies with other progressive organizations and their leaders and activist networks.

In a word, Dobrowolosky refers to the actions of the pro-choice movement in the battle over abortion rights to be "pragmatic" (2000: 10). Drawing on both reformism (change through conventional political channels) and radicalism (restructuring or overhaul of various systems), she notes that the strategies of the pro-choice movement "…have not reflected an either/or strategy but a pragmatic 'both/and' mentality. Their strategic emphases have shifted in differing circumstances from a reliance on, for instance, caucusing and lobbying to inciting mass-based protests" (2000: 10). That said,

at the end of the day, it was ultimately a constitutional challenge brought about by Dr. Morgentaler and Dr. Scott after charges were laid against them in late 1982 and early 1983, and decided by the Supreme Court in 1988, which struck down or "eliminated" section 251 of the *Criminal Code of Canada*, which had for years highly regulated abortion, making it illegal in most circumstances. While this may have been the ultimate action that legalized abortion in Quebec (and throughout Canada), the multi-faceted strategy employed by the pro-choice movement in the decades leading up to the Court's ruling had played an important role in shifting the public, political, and ultimately legal discourse on reproductive rights.

Since the entrenchment of the *Canadian Charter of Rights and Freedoms*, another avenue, and potentially more powerful one, to impact Canadian laws has come about. While parliament can (and does) still make, amend, and repeal laws, another institution – the Supreme Court, largely as a result of the powers provided to it by the *Charter* – has provided social movements with another opportunity for (re)structuring legislation. In the case of *Morgentaler*, at least, this opportunity proved to be successful, so much so that parliament has yet to respond with a new law to fill that void by the one struck down by the Supreme Court in 1988.

The decision in Morgentaler also impacted the *Canada Health Act* and the Report on Access to Abortion Service in Ontario, both of which affirm a definition of abortion as a medically necessary procedure (Report on Access to Abortion in Ontario, 1992). Furthermore, abortion has been deemed a "medically necessary [procedure] by all Provincial/Territorial colleges of physicians and surgeons" (Palley, 2006, p.567). This representation of abortion as a medically necessary service directly supports Justices

Dickson, Beetz and Wilson's arguments that denying timely access to abortion represents a violation of women's right to security of the person. Thus, by confirming s.251's violation of s.7 of the *Charter*, the Court strengthened the position of the *Canada Health Act* of 1984 and pre-dated the conclusions of Report on Access to Abortion Service in Ontario which were reached in 1992. Although the *Canada Health Act's* decisions regarding abortion take place at the federal level, their impacts are still applied within Quebec.

Returning to the opinions of particular Justices who presided over the Morgentaler case, it is necessary to note the impact of Justice Bertha Wilson's judgement in the reproductive rights movement in Canada. Justice Wilson objected to the government's ban on abortion on several grounds including: its violation of liberty; denial of dignity and security of person. Furthermore, in her judgement in Morgentaler, Wilson famously declared that the issue and repercussions of pregnancy and abortion could only be fully understood from a female perspective (*R v. Morgentaler*, 1988, para 165).

Although s.251 was declared unconstitutional in *Morgentaler, 1988*, the long-term effects of the case have also included absence of any definitive law, criminalizing or outright permitting abortion. Since the case, Dr. Morgentaler (and Drs. Scott and Smoling), have proceeded to maintain and set up new clinics in Toronto, Montreal, Ottawa, Fredericton and St. John's; however, the future availability of abortion services in Canada remains uncertain.

As was previously discussed, the Conservative government under Prime Minister Mulroney attempted on two occasions to pass legislation on abortion, without any

success, in response to the Court's ruling in Morgentaler. Although unsuccessful in both instances, they have not been the only attempts to re-regulate reproductive freedom or otherwise restrict a woman's access to a safe and secure abortion.

Just a year after the Court's ruling in *Morgentaler, 1988*, the vulnerability of women's reproductive rights was also evidenced by the attempted claim to a protection for a fetus in *Borowski v. Canada (Attorney General), 1989* (Gavigan, 1987). In this case, Joseph Borowski, a pro-life activist from Saskatchewan, argued that s.251 (4), (5) and (6) violated a fetus' right to life, liberty and security of the person and equality under s.7 and s. 15 of the *Charter*. In Borowski, "The Court of Queen's Bench found s. 251(4), (5) and (6) did not violate the *Charter* as a fetus was not protected by either s. 7 or s. 15 of the Charter" (*Borowski v. Canada,* 1989). When Borowski appealed his case to the Supreme Court, the Court unanimously held that this was a moot issue as s.251 had already been struck down in Morgentaler (*Borowski v. Canada*, 1989). Had the case been successful at the Supreme Court, the ruling would have applied to Quebec as well, and would have greatly limited abortion access. The Court's ruling against Borowski, then, had no real impact to the status quo in Quebec.

In light of the Court's ruling in Borowski, it could be theorized that had the Court not struck down s.251 in Morgentaler it would have been required to consider its implications from the view-point of a pro-life challenge, possibly even to the detriment of women's reproductive choice. In Quebec, women's reproductive rights were improved by the opportunities created by the *Charter* coupled with the activism of the women's movement as well as Dr. Morgentaler. These elements came together to change the path of reproductive rights in Quebec, post 1982. However, what we see now with the absence

of abortion law in Quebec is the potential for future change in ways that would either benefit or hinder women's reproductive rights in their entirety.

Tremblay v. Daigle

The second major Canadian case to be discussed within this dissertation is known as Tremblay v. Daigle, which took place in 1989, and raised the question of whether or not male partners have the ability to prevent a woman from having an abortion. It is of great importance as the case came out of a situation in Quebec and relied on Quebec legislation. In this case Chantal Daigle had become pregnant as a result of her relationship with her former partner, Jean-Guy Tremblay. Daigle claimed that the relationship ended because Trembley had been abusive towards Daigle. After the relationship ended, he decided to pursue an injunction against Daigle in order to prevent her from obtaining an abortion. The case was heard in Quebec, and unlike Morgentaler, 1988, the trial judge relied heavily on the provincial *Quebec Charter of Human Rights and Freedoms* in coming to a decision. Before the Quebec Court, Tremblay raised the argument that a fetus should be considered a human being under the *Quebec Charter of Human Rights and Freedoms*. Specifically, the Quebec Judge found that:

> A foetus is a "human being" under the Quebec *Charter of Human Rights and Freedoms* and therefore enjoys a "right to life" under s. 1. This conclusion, he added, was in harmony with the *Civil Code*'s recognition of the foetus as a juridical person. He then ruled that the respondent had the necessary "interest" to request the injunction. The trial judge concluded, after considering the effect of the injunction on the appellant's rights under s. 7 of the *Canadian Charter of Rights and Freedoms* and s. 1 of the Quebec *Charter*, that the foetus' right to life should prevail in the present case. The injunction was upheld by a majority of the Court of Appeal (*Tremblay v. Daigle*, 1989, para 5).

Not surprisingly, the case was referred to the Supreme Court. Once it reached there, the issue at hand was whether Tremblay could claim that a fetus had rights under the *Canadian Charter of Rights and Freedoms*, the *Quebec Charter of Human Rights and Freedoms* or the *Quebec Civil Code*. The Supreme Court had an obligation to consider Tremblay's argument that a fetus was to be considered a human being under the *Quebec Charter* as this issue had been presented before the lower court. During the time that the case was before the Supreme Court, Daigle travelled to Boston where she obtained a legal abortion, causing the case to become moot. Despite the mootness of the case, the Court recognized the importance of the legal question before them and decided to offer a legal opinion on the case.

When considering the *Quebec Charter of Human Rights and Freedoms*, the Court determined that the fetus was guaranteed no rights under it. More specifically the Court stated:

> The injunction must be set aside because the substantive rights which are alleged to support it -- the rights accorded to a foetus or a potential father -- do not exist. The Quebec Charter, considered as a whole, does not display any clear intention on the part of its framers to consider the status of a foetus. It is framed in very general terms and makes no reference to the foetus or foetal rights, nor does it include any definition of the term "human being" or "person". This lack of an intention to deal with a foetus's status is, in itself, a strong reason for not finding foetal rights under the Quebec Charter (*Tremblay v. Daigle*, 1989, para 6).

If the legislature had wished to accord a fetus the right to life, it is unlikely that it would have left the protection of this right in such an uncertain state. The Court did not apply the *Canadian Charter of Rights and Freedoms* to this case as this was a civil matter between two private parties and therefore the *Canadian Charter* did not apply. The *Quebec Charter* applied in this instance, as it can be utilized in civil matters (unlike the

Canadian Charter), however, the Supreme Court's ruling remained paramount. The Court also made note of the "Anglo-Canadian" law that a fetus does not have rights until it is born alive (*Tremblay v. Daigle*, 1989, para. 10).

Tremblay v. Daigle is significant for the reproductive rights movement in Quebec because it created a legal precedent that a fetus does not possess individual rights. Furthermore, it suggested that had the framers of the Quebec Charter wished to include a fetal right to life they would have done so. Therefore, the absence of a fetal claim to rights suggests that they are not to be guaranteed by law. This absence of a fetal right to life appears in stark contrast to Ireland's right to life of the unborn. Where in Quebec a fetus has not been deemed a rights bearing entity, in Ireland many debates over reproduction are founded on a fetal right to life.

While an attempt at securing fetal rights has never been successful in Canada (and as such has rarely been used), it has been utilized more frequently in Ireland. As Ireland is part of a larger European context it is necessary to also consider attempts to claim fetal rights using a human rights charter that have taken place within Europe. Although Ireland has shielded its own laws from EU involvement, this is not to say that individual case law will not come to bear in Ireland in some form or another (particularly as individuals may approach the ECJ as complainants against Ireland). Two such cases heard before the ECHR were *Vo. v. France, 2004* and *Evans v. The United Kingdom, 2007*. In both *Vo* and *Evans* the ECHR was asked to determine if article 2 of the *European Convention on Human Rights* could be extended to protect the rights of a fetus. Specifically article 2 states that:

> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a

> court following his conviction of a crime for which this penalty is provided by law.2.Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence;(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;(c) in action lawfully taken for the purpose of quelling a riot or insurrection (*Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI. 1950*).

Vo v. France involved a formerly pregnant woman who argued that "a violation of Article 2 of the Convention [occurred] on the ground that the conduct of a doctor who was responsible for the death of her child in utero was not classified as unintentional homicide (*Vo. v. France, 2003*, sec. 3, p. 1). On November 27th, 1991, two women, both with the last name Vo visited Lyons General Hospital. The appellant, Mrs Thi-Nho Vo was visiting her OB/GYN for a routine six-month pre-natal check-up, while Mrs Thi Thanh Van Vo was having a contraceptive coil removed by the same physician, Dr. G. Having accidentally mistaken the identity of the two women, Dr. G ruptured Mrs. Thi-Nho Vo's amniotic sac (in thinking that he was to remove a contraceptive coil), thus causing the loss of amniotic fluid. On December 4th, 1991 it was determined that Mrs. Thi-Nho Vo had lost a substantial amount of amniotic fluid and that the pregnancy could not be continued. "The pregnancy was terminated on health grounds on 5 December 1991" (*Vo. V. France, 2004*, sec.12, p. 2).

With regard to the potential for article 2 to be applied to the rights of a fetus, the ECHR, "Holds by fourteen votes to three that there has been no violation of Article 2 of the Convention." Specifically, the majority explained that:

> It consequently transpires from the present stage of development of the law and morals in Europe that the life of the unborn child, although protected in some of its attributes, cannot be equated to postnatal life, and, therefore, does not enjoy a right in the sense of "a right to life", as

> protected by Article 2 of the Convention. Hence, there is a problem of applicability of Article 2 in the circumstances of the case. Instead of reaching that unavoidable conclusion, as the very reasoning of the judgment dictated, the majority of the Grand Chamber opted for a neutral stance, declaring: "the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention" (Vo v. France, 2004, para 86).

In light of the ECHR's commentary above in *Vo*, the Court could not, at present, find the legal grounds to declare that article 2 could be extended to the protection of fetal rights.

The significance of *Vo* to Ireland's legal position on abortion, namely the right to life of the unborn is that this case illustrates that Ireland's protection of fetal rights is quite unique within the larger European context. The argument that a fetus has a positive right to life is one that has been made and successfully accepted in Ireland (s.40 (3)(3) of the Irish Constitution and its protection of fetal life), which runs contrary to the prevailing opinion of the ECHR, at least to the degree that it was expressed in Vo. Certainly, this understanding of fetal rights by the ECHR is not congruent with the prevailing understanding of fetal rights in Ireland, as the ECHR's interpretation has not yet become influential, in Ireland.

The second major case to question the possibility of applying article 2 to the protection of fetuses was *Evans v. The United Kingdom, 2007*. In 2001 Natallie Evans and her former partner, Howard Johnston originally consented to the creation of embryos for the purpose of future implantation, however, the couple broke up in May of 2002. In 2002 Johnston requested, in accordance with English law, that the embryos be destroyed as he no longer consented to their implantation. What is most significant about this case as it pertains to article 2 is that, "In her original application and in her observations before the Chamber, the applicant complained that the provisions of English law requiring the

embryos to be destroyed once J. withdrew his consent to their continued storage violated the embryos' right to life, contrary to Article 2 of the Convention" (*Evans v. The United Kingdom, 2007*, sec. 53). Much like in *Vo*, in *Evans* the ECHR once again found that: "The Grand Chamber, for the reasons given by the Chamber, finds that the embryos created by the applicant and J. do not have a right to life within the meaning of Article 2 of the Convention, and that there has not, therefore, been a violation of that provision" (*Evans v. The United Kingdom, 2007*, sec. 56).

On one hand, it is interesting to note that in all three cases mentioned above (*Daigle v. Tremblay*, *Vo* and *Evans*) where an applicant has sought to secure a fetal right to life using human rights conventions (either domestic or international) none has been successful. This absence of a fetal right to life in these three cases further illustrates the unique legal precedent set by Ireland's protection of the right to life of the unborn. On the other hand, the mere existence of these cases is indicative of the fact that attempts are in fact being made outside of Ireland to secure a fetal right to life. While at present the various Courts cited above have declined to extend a right to life to a fetus, this does not entirely rule out the potential for this type of right in the future.

Although the usage of fetal rights has not been successful in stopping the proliferation of abortion clinics in Quebec, other attempts to halt their development have occurred. Following his legal victory in 1988, Dr. Morgentaler attempted to establish an abortion clinic in Nova Scotia, only to have the province declare such an action illegal under criminal law by passing legislation which declared that abortions must be carried out in hospitals. The province's justification for this action was that they were attempting to protect the public health care system by disallowing the creation of private clinics.

Morgentaler then turned to the Supreme Court arguing that the recent legislation of Nova Scotia was unconstitutional, and once again sought to use the Charter as an opportunity to bring about legal change. The result was that the Supreme Court ruled that Nova Scotia's legislation against private abortion clinics was actually an invalid or unconstitutional form of criminal law, thus declaring the law to be unconstitutional (*R v. Morgentaler*, 1993). While important at the federal level, and especially in provinces such as Nova Scotia in which abortion access was limited to hospitals, the ruling had no real impact in Quebec, where abortions had long occurred in clinics outside of a hospital.

Since the 1988 decision, there have been several failed attempts to introduce legislation in the House of Commons that would place legal restrictions on women's ability to fully control their reproductive autonomy. For example, in June 2006, a socially-conservative member of the Liberal Party introduced Bill C-338, that, if passed, would have made abortion after 20 weeks gestation a criminal act (Parliament of Canada, Bill C-338).

Another attack on women's reproductive rights came more recently in November of 2007 when private member's Bill C-484 was introduced in the House of Commons. This act sought to amend the *Criminal Code* declaring a criminal offence where there is an attempt to "injure, cause the death of or attempt to cause the death of a child before or during its birth while committing or attempting to commit an offence against the mother" (Parliament of Canada, Bill C-484).

Bill C-484 was originally designed to allow the Crown to prosecute an individual with two counts of homicide when a pregnant woman was murdered. While on the surface Bill C-484 may not appear directly counterintuitive to reproductive rights, upon

further consideration it is clear that a Bill of this nature has the potential to restrict women's rights in future cases. Bill C-484 contained the potential to set a dangerous precedent of protecting the life of the unborn, as a separate entity from its mother, which could in turn restrict women's choice with regard to abortion. For example, if a fetus' "life" is enforced by criminal sanction, then the argument could easily be made that the same right would apply to fetuses in all cases. Under the s.223 of the *Criminal Code of Canada* a fetus is not alive or a human. S.223 clearly states that "a child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother" (*Criminal Code of Canada*, 1970, s.223). Under the proposed Bill C-484 a fetus has some sort of right. In 2008 the Conservative Government opted to abandon Bill C-484.[8] If it passed, however, its provisions would have applied in Quebec and may quite likely have greatly reduced a woman's autonomy to have an abortion in the process.

Another attempt to create abortion related law which could hinder women's autonomy with regard to pregnancy was illustrated by Bill C-510, also referred to as Roxanne's Law. In April of 2010, Conservative MP Rod Bruinooge from Winnipeg South introduced Bill C-510 which sought to amend the Criminal Code to "prohibit coercing a woman into an abortion via physical or financial threats, illegal acts or through argumentative and rancorous badgering or importunity" (Lewis, 2010). Bill C-510 came in response to the murder of Winnipeg woman, Roxanne Fernando, who Bruinooge

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[8] A previous attempt to consider the fetus as a rights bearing entity occurred in 1997 when the Winnipeg Family and Child Services attempted to forcibly detain a pregnant woman who was addicted to glue sniffing for the duration of her pregnancy. Once this case reached the Supreme Court, the Court ruled that the woman could not be detained as a means of protecting the rights of the child as the fetus was not a rights bearing entity under Canadian law. See *Winnipeg Child and Family Services v. D.F.G.* (S.C.C. 1997).

alleges was murdered because she refused an abortion. According to the lawyers in this case as well as the accused, refusal to obtain an abortion was not the motive behind Ms. Fernando's murder (Lewis, 2010). While Bill C-510 was voted down by Members of Parliament in December 2010, its presence illustrated an attempt to hinder women's ability to make reproductive choices for themselves by suggesting that abortion is a procedure that women are coerced into obtaining. Much like Bill C-484, if it were to have passed, its provisions would likewise have applied in Quebec and may have had a chilling effect on abortion access in Quebec.

More recently, Conservative backbench and staunch pro-life MP Stephen Woodworth introduced M-312, which sought the creation of a parliamentary committee to review whether the current definition of a human being could be extended to include a fetus (Castle, 2012). More specifically, he was seeking review of s. 223 of the Criminal Code, which says a child becomes "a human being . . . when it has completely proceeded, in a living state, from the body of its mother" (Press, 2012). In September of 2012, in a vote of 91-203, M-312 failed before Parliament, however if such an amendment were to pass, it would open the door to a re-criminalization of abortion by giving personhood status to fetuses. As is evidenced by the possible implications of Bills C-338, C-484 and C-510 and M-312, reproductive rights in Quebec are, at best, precarious, and constantly at risk of being legislated away by a social conservative federal government. With the lack of regulation and criminalization of abortion throughout Canada, it is now the pro-life movement that is seeking opportunities to bring about change to abortion laws. It is Parliament, and more specifically pro-life MPs, who are looked to by the pro-life

movements as the Supreme Court has closed the door on the issue of fetal rights, and has struck down many laws that have sought to regulate abortion in various ways.

Although the current federal government may have distanced itself from Woodsworth's position, it is not supportive of a woman's right to reproductive autonomy. Their decision to refrain from restricting abortion internally is likely more the result of a desire to maximize votes. In Quebec, the primary question at present seems to be 'when does human life begin,' a question which is not emphasized in Ireland, likely as a result of a fairy clear statement of this in s. 40.3.3's fetal right to life provisions. Despite not yet seeking to restrict legal access to abortion internally, the current government has no problem using its influence to restrict access to abortion abroad, and more specifically access to abortion for the poorest women living in developing countries. In 2010, for example, the government announced its desire to refuse to include funding for abortions in a maternal-health plan submitted to the G8. Although the government claims to be committed to bringing basic health services to the poorest of pregnant women and children (largely in Africa), they have consciously refrained from including access to safe and legal abortions as a part of that plan (Rennie, 2012).

As is evidenced by the possible implications of Bill C-338, C-484 and C-510, as well as M-312, the absence of a clear law prohibiting or allowing abortion and reproductive freedom after *Morgentaler, 1988* represents a tenuous situation for women in Quebec. As the above mentioned Bill's illustrate, reproductive rights are constantly at risk of becoming re-regulated or re-criminalized through an act of Parliament.

As the uncertainty regarding future interpretations of s.7 to protect positive rights (such as a right to abortion) and the difficulties in obtaining access to abortion

services on a per province basis suggest, reproductive rights in a post-1988 Morgentaler context should not be considered completely secure. Morgentaler's final legal actions in New Brunswick, as well as Arctic Canada, (as a result of a lack of abortion clinics in these areas) illustrates not only the short comings of the *Morgentaler, 1988* decision, but also suggests that the legal debate over abortion has yet to be resolved.

Abortion in Ireland and Quebec

Returning to the comparison between Ireland and Quebec, as the above discussion illustrates, and subsequent chapters will expand upon, like Ireland, Quebec's population was historically largely Catholic and maintains strong nationalist sentiments. As Maureen Baker (2008) explains, "In…Quebec, both the Catholic Church and state officials urged citizens to marry young and reproduce for the good of the nation" (p.73). Also, like Ireland, Quebec is part of a post-colonial project, specifically as part of Canada, which is itself a former British colony. As a minority culture within Canada, Quebec nationalists have argued that French-Canadian women living in Quebec have a duty to reproduce the French-Canadian Nation (Baker, 2008). However, there are also stark institutional differences that greatly influenced reproductive rights and abortion access in Ireland in Quebec. For example, in 1969 in Quebec and throughout Canada therapeutic abortions performed in hospitals were legalized (Baker, 2008). Where in Ireland, hospitals are not permitted to perform abortions, in Quebec women are able to obtaining the procedure a hospital where in most cases abortions are paid for by health care (Morgentaler.ca, 2012).

Most importantly, however, the advent of the *Charter* in 1982 provided Quebec's pro-choice movement with an opportunity that did not exist in Ireland. This opportunity

proved to be fruitful, and transformed the regulation of abortion, though a series of cases in which the Supreme Court utilized the Charter to emphasize women's reproductive autonomy, close the door on constitutionally protected fetal rights, and ultimately struck down the state's regulation and criminalization of abortion

In Ireland, nationalism and birth rate increases are encouraged not only through seeing women as mothers and protecting fetal rights, but also by failing to provide access to safe, affordable abortion access. On the other hand, however, in Quebec during the 1960s the provincial government began a program of offering monetary incentives to women who chose to have children (Baker, 2008). The Quebec government has also created a provincial day care program where day care is available to all parents at a cost of $7 per day (Baker, 2008). It should be noted however, that while affordable day care is officially universal in Quebec, this does not mean that it is necessarily available to all who require it. There seems to be a significant difference between a strategy of offering monetary incentives to have children and providing cost effective day-care as opposed to prohibiting the termination of a pregnancy. Where Quebec appears to offer positive incentives for child-rearing, Ireland has chosen to criminalize abortion.

A final element which can be viewed as separating Ireland and Quebec's reproductive rights journey is the absence of a focus on women's experiences in Irish literature on abortion. In Ireland the focus of political discussions surrounding abortion has primarily centred on the right to life of the unborn and only secondarily on the rights of women. When women as women are the focus of abortion-related legislation in Ireland, the focus has only been on negative restrictions against women and not on positive rights. As is exemplified by each of the three referenda on abortion rights and

access in Ireland, the concern of legislatures and courts is often focused on determining when negative restrictions can be imposed upon women's freedom (of travel and to education) in the name of protecting the unborn, thus neglecting to comment on women's positive rights to reproductive autonomy. As the Irish Courts have illustrated (particularly in the *X* case), an Irish woman may only have access to a legal abortion in Ireland if her life is immediately at risk, potentially as a result of a threat of suicide (*Attorney General v. X*, 1992). Therefore, in order to secure a positive right to abortion in Ireland, a woman must be deemed suicidal.

We can contrast this example from Ireland to Quebec where litigation surrounding abortion has been framed within a form of rights-based dialogue with the aim of determining when and where a woman may have access to abortion services. Specifically during the Morgentaler case of 1988, the Supreme Court was asked to determine if section 251 of the Criminal Code and its requirement that abortions be performed in hospitals at the consent of a Therapeutic Abortion Committee (TAC), violated a woman's autonomous right to life, liberty and security of the person (as it is guaranteed by section 7 of the *Charter of Rights and Freedoms*) (*R v. Morgentaler*, 1988). Morgentaler was specifically arguing that by forcing women to obtain abortions solely in hospitals and at the consent of TAC's, their individual liberty and security was being violated (*R v. Morgentaler*, 1988). What is most striking about the Morgentaler case, as compared to abortion based litigation in Ireland, is that in Quebec, women's rights as autonomous individuals were at the forefront of the debate, while in Ireland they were considered as secondary to the rights of the unborn.

Conclusion

In conclusion, after reviewing the most significant Court cases regarding abortion in Ireland, the five referenda on abortion as well as the legal history of abortion in Quebec, it is clear that abortion remains a contentious issue. In comparing abortion access and law in Quebec and Ireland it becomes clear that in Quebec, the Supreme Court and Dr. Henry Morgentaler, played significant roles in the advancement of reproductive rights.

It is also apparent that pro-choice movements in each jurisdiction have used different institutional opportunities, in their effort to secure a more liberalized policy surrounding abortion access. These opportunities, have not been equal, and help to explain the divergent policy surrounding abortion in the present day. In Quebec, pro-choice forces were able to rely on the newly passed *Charter* to dramatically overhaul, and ultimately end, the state's regulation of reproductive access. In Ireland, however, the opportunities presented by a newly created and relatively malleable constitutional bill of rights did not occur, and the pro-choice movement was required to utilize only the opportunities available to it. This consisted largely of the unfortunate events surrounding the aftermath of the rape of a fourteen-year-old girl at the hands of a family friend and the public outcry of the limited legal response and options to this. This, in turn, resulted in three referendums, which while not overhauling reproductive rights in the fashion that the decision in Morgentaler did for women in Quebec, did have the effect of providing some liberalization in Ireland, namely allowing for the distribution of literature on the topic of abortion and secured for women the right to travel while pregnant. In light of Ireland's far

more conservative political culture, these were still important victories, especially so in light of the limited opportunities for change, especially relative to Quebec.

As the legal history of both case studies illustrates there are many similar yet unique themes that influence reproductive rights and abortion access. Specifically, the central themes and debates inherent in discussions over reproduction include: the tension between the rights of a pregnant woman and those of a fetus, the impacts of multilevel governance, the role of nationalism and the Catholic Church, the existence (or lack thereof) of institutional opportunities for change, and finally the impact of the women's movement as well as prominent individuals from each case study. As the above mentioned legal battles and legislation have illustrated, the theme of nationalism and reproduction lies at the heart of debates over abortion in both Ireland and Quebec.

At this point I will now begin an examination of each of the four potential variables in an attempt to uncover why Ireland has remained so opposed to legal abortion.

Chapter 5: Nationalism

> It has often seemed in Ireland that where attempts are being made to hold onto the image of Irish society, despite its divergence from the actual lives of its people, it is women who play the central role. Women, who are the centre of the family, defined in the constitution as 'the natural primary unit group of society' are the standard bearers, the holders of the culture, the representatives of its soul. So while it was women and the women's movement who organized and demanded change in the 1970s, seeking greater control over their bodies and their lives, it was also women who formed the basis of the PLAC (Pro Life Amendment Campaign) across the Country (Barry, 1991, p. 114).

In light of the above statement, we must ask, what if any, is the relationship between women, nationalism and abortion? Without a doubt, a distinct difference between abortion policy in Ireland and Quebec exists, despite some important sociological similarities between the two. What explains this divergent policy outcome between Ireland and Quebec? In this chapter, I consider the variable of nationalism, and examine its impact on abortion policy. As we will discover, the ways that feminists and nationalists work with or against each other plays a significant role in each states' reproductive rights movement. More specifically, is nationalism the most important variable in explaining the divergent policies in Ireland and Quebec?

To effectively answer this question, the chapter begins with a theoretical discussion of the relationship between feminism, women as individuals, women as mothers and nationalism. Recalling the one of the central themes considered in this dissertation, this chapter considers the conflict over questions of who controls a woman's body and why this control is of public concern. I examine the intricacies of Irish nationalism, particularly what makes it unique from Quebec nationalism. To conclude this chapter I analyse impact of nationalism on abortion law in Ireland and Quebec.

Nationalism and Mothering in Ireland and Quebec

While the debate over reproductive rights in Ireland may seem to be primarily a battle between pro-choice and pro-life supporters over issues of abortion and the life of a fetus, Irish nationalism forms a significant underlying political element which cannot be ignored. How do women "fit" into the myth of Irishness? What is, and what has been, their role and responsibility in shaping the Irish nation? In this sense, the abortion debate and issues of women's reproductive autonomy cannot be viewed independently of larger questions surrounding nationalism and the Irish nation. The debate over reproductive rights in Ireland is often one in which the state seeks to control women's ability to choose when to reproduce, thus maintaining a traditional gender role of women as mothers.

For feminist scholars such as Anne McClintock (1993), Jill Vickers (2002), Lisa Smyth (1998) and Nira Yuval-Davis (1997), the conception of 'women as mothers' has been constructed as responsible for both the physical reproduction of the nation and the formation of national identity. Indeed, it was Anne McClintock (1993) who famously stated that "All nationalisms are gendered, all are invented, and all are dangerous" (p.61). Women, then, cannot be viewed independently of the nationalist project, and both they and their bodies are often subservient to its goals. Historically, throughout many geographical regions, the gendered nature of nationalism has expressed itself via a form of male dominated participatory citizenship.

While women as mothers are considered essential to the reproduction of the state itself, Yuval-Davis (1997) explains that women are "often excluded from the collective 'we' of the body politic, and retain an objective rather than a subjective position" (p. 47). In other words, while women are embodiments of national identity, they are at the same

time placed outside the collective. They are less a rights-bearing citizen and more a nurturing figure whose womb can reproduce for the nation, whose bosom can sustain for the nation and whose supposed natural instincts can care for and raise the future of the nation. For Yuval-Davis (1997), the role played by women within the national collective as mothers and reproducers of the nation becomes increasingly problematic when women's obligations to reproduce a citizenry countermand their reproductive rights. A nationalist project, especially one whose continued existence is viewed – rightly or wrongly as a daily struggle – is less likely to be willing to allow for reproductive autonomy for fear of what it might do to the future of the nation.

In addition to a conceptualization of women as producers and reproducers of the nation through sexual reproduction and child rearing, the dichotomy between public and private spheres of citizenship is often associated with nationalism and reproduction. Echoing Yuval-Davis, Lisa Smyth (1998) explains, "Women's lives [are] therefore restricted to the domestic sphere, in order to secure a 'common good' from which they are constitutionally excluded" (p.64). In this sense, the traditional 'private' sphere occupied by women is made public and linked to the broader national project. That the termination of a pregnancy is a matter of public concern also supports the notion that women (and their related reproductive capacities) are somehow the property of men, whether it is their father, husband, or a patriarchal society more generally. With this unique form of nationalism that protects fetal rights at all costs, comes a subordination of, or outright rejection of women's rights as citizens and individuals, particularly the right to control their own bodies. As Fletcher (2001) argues, "By depicting the Irish public as the body on whose behalf fetal life is absolutely protected [by s.40 (3)(3)], the courts

constructed the fetal right to life as a national interest whose protection necessitated the exclusion of women's rights" (p.579). This then leads one to ask: when considering the case of Irish nationalism, who is considered a citizen of the Irish nation? Are Irish women's rights secondary to the rights of Irish fetuses?

Moving from a discussion of women's actions in the public and private realm more broadly speaking to a specific discussion of reproduction, Yuval-Davis (1997) asserts that the criminalization of abortion coupled with other forms of restricting women's reproductive choice represents the treatment of women as property of the state (see also, Tsagarousianou, 1995). Thus, women's rights as women are often superseded by the state's desire to control reproduction through restrictive reproductive laws.

For Jill Vickers (2002), the realm of civic participation has long contained a gendered element, namely the fact that citizens were historically assumed to be male. More importantly, historical ideologies of citizenship focused on male characteristics, allowing women to participate in civic life only as the wives or mothers of male citizens. For example, historically where women were denied the right to vote, this practice was often justified by arguing that a woman's opinion would be unanimous with her male counterpart, either her father or husband, and therefore did not need to be considered independently. While Vickers refers to women's role in reproduction as possessing power to physically reproduce groups bearing and rearing children, this power is often over-shadowed by an ideological focus on male political participation. The role of women in creating and maintaining gendered nationalisms has often been to teach the ideology of male-centred civic participation to future generations of children.

For Yuval-Davis (1997) there are five primary ways in which women participate in the formation of nations, or nationalist movements. First, women biologically reproduce ethnic groups; second, through reproduction women contribute to the maintenance of collective and ethnic boundaries; third, women act as transmitters of culture; fourth, they act as signifiers of cultural or national difference via the symbols they create and reproduce; and fifth, they participate as members of national militaries or political groups (see also, Vickers, 2002).

Yuval-Davis' five methods by which women participate in the formation and maintenance of nations then lead her to formulate two distinct yet interrelated concepts: 'nationed gender' and 'gendered nations'. In other words, each experience of gender occurs within a nation or national culture and at the same time, and echoing McClintock, Yuval-Davis argues that all nations are gendered (Vickers, 2002). Thus, one cannot separate a woman's identity as a woman from her national setting. This has been, and continues to be, particularly true in the Irish context, in particular with regard to Yuval-Davis' first example: women as biological reproducers of the state. Abortion debates in Ireland directly challenge this role of women as "reproducer of the state" as the desire to terminate a pregnancy if one chooses flies in the face of traditional female responsibilities.

Understanding Irish Nationalism

For the purposes of this dissertation, nationalism will be defined following the work of Garth Stevenson (2006), who quotes Louis Balthazar's definition of nationalism, as "a movement that consists of giving priority to national affiliation and to the struggle

for a better recognition of the nation to which one belongs"(p.8). More specifically, Irish nationalism is conceived as a project which has been fostered over time through a process of struggle against its former colonizer, Britain, culminating in 1916 with the Easter Rising or Easter Rebellion. The three primary components associated with Irish nationalism as it pertains to this dissertation are: a strong anti-British sentiment, a militaristic or revolutionary approach and finally, a gendered division of responsibilities to the nation.

Irish nationalism came to a head during Easter week of 1916 when the Irish Republican Brotherhood (IRB), the Irish Volunteers and James Connolly's Irish Citizen Army launched a rebellion against British rule, particularly in opposition to the onset of British-led conscription of Irish men into military service during the First World War (McGarry, 2008). The Easter Rising was important to the larger nationalist project in Ireland was that it renewed a form of militant Irish nationalism ultimately leading many Irish citizens to call for the creation of an Irish Republic. As Feaghal McGarry (2008) explains, "The Easter Rising provided a model, a justification and a degree of legitimacy for future generations of Irish nationalists who would use physical force to achieve their aims. Ultimately, the Easter Rising achieved almost everything the rebels had hoped for" (p.1). Just two years after the Easter Rising, in December of 1918, Sinn Fein, representing Irish republicans, won 73 of Ireland's 105 seats in British Parliament. In January of 1919, Sinn Fein held the first Dáil (a newly created sovereign Irish legislature), thus establishing the Irish Republic and declaring independence from Britain. This action by Ireland was met with hostility from Britain, leading to at least two years of war between the two before Britain recognized the independence of Ireland.

In 1919 the Republic of Ireland began a process of institutionalizing a form of Irish identity which can be described as nationalism created in opposition to an 'other,' namely the British. Even after gaining its independence from Britain, Irish nationalism maintained an overt anti-British sentiment. As Ireland was formed in direct rebellion against British colonial rule, it is logical that many tenets of Irish nationalism were specifically anti-British, for example strong ties to Catholicism and conservative social values.

Following the passage of the *Anglo-Irish Treaty* in 1921, which established an Irish free state that was recognized by the British (though as a self-governing Dominion and not as a sovereign Republic), the 1922 *Constitution of the Irish Free State* was passed by Irish lawmakers. This document, was, however, rejected by a number of hard-line Irish nationalists (many were members of Fianna Fáil), who saw the new Constitution as being too closely associated with the divisive *Anglo-Irish Treaty*. After Fianna Fáil was elected into government in 1932, a process was undertaken to ratify a new, more overtly Irish nationalist constitution, which would be realized five years later. The new constitution contained many 'Irish laws' which would serve as the foundations for the new Republic.

The clearest account of 'Irish Laws' and the foundations of Irish values, at least as it relates to nationalism, women, and reproduction, is illustrated by Article 41 subsections (1) and (2) of the 1937 *Constitution*, which state: "1) In particular, the State recognises that by her life within the home woman gives to the State a support without which the common good cannot be achieved; and 2) [t]he state shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in

labour to the neglect of their duties in the home" (*Irish Constitution*, 1937, Article 40(3)(3).

These sections of the Constitution are particularly helpful in illuminating many of the predominant themes discussed within this chapter. Subsection one establishes a clear link between the nation and the role that women are to play within it, mainly a life within the home and its contribution to a broader common good. The Irish state has fostered – and constitutionalized – an environment in which women are expected to reproduce, both physically and emotionally, by having babies and then raising 'good' Irish children. Subsection two attempts to ensure this by constructing the 'private' sphere as the sphere occupied by women, and endeavours to make sure that they need not venture into the 'public sphere.' In this sense, social, emotional, and economic opportunities are quite limited. Paradoxically, however, though certainly by design, the 'private' sphere remains private so long as those within perform their duties as demanded by the state. As soon as they assert too much control in the private sphere, for example, attempting to obtain an abortion, that sphere ceases to be private and becomes a part of the public sphere, where it is easier to regulate.

Irish Nationalism and Mothering

Irish women do not simply bear children for themselves and their own family unit on a micro-level, they also bear children for the nation as a whole, reproducing the Irish population and a sense of Irishness on a macro-level. Framed within the political context of Irish women as mothers of Ireland, advancements in reproductive rights and access to abortion would certainly challenge the traditional roles of Irish women as 'Irish mothers'

and perhaps the entire nationalist project itself. If Irish women are to be mothers of the nation, by obtaining an abortion, an Irish woman is not simply terminating an unwanted pregnancy, but is also impacting the growth of the Irish nation and undercutting the nationalist project. As a result, the state has placed restrictions not only on women's ability to obtain an abortion, but has also historically limited who may buy contraceptives, from whom and under which circumstances, limited access to information on reproductive rights, and limited the travel and movement of pregnant women (whom it fears may obtain an abortion outside of Ireland).

Conceptions of Irish nationalism often associate 'woman-ness' closely with motherhood. Specifically, when considering the relationship between reproduction and motherhood in Ireland, Ailbhe Smyth (1992) explains that "[i]n a society where motherhood remains virtually the only secure source of canonised validation for the vast majority of women, the decision *not* to be a mother is deeply subversive and risky" (p. 144). For some, to choose reproductive freedom and abortion is often to contradict what it means to be an Irish woman. For Smyth, the relationship between womanhood and motherhood in Ireland is so interconnected that many women are considered to be of political value only once they become mothers. As was discussed above, if women are not deemed to be political themselves, it is only once they become mothers to male children, who have the potential to become political actors, that they provide a useful political contribution. At the same time, if they are not seen as mothers – or actively opt to not be, especially after becoming pregnant – it follows that they are somehow less of women, or not women at all.

Smyth (1992) describes the past and present situation of reproductive rights control in Ireland as a police state where "the reproductive activities of women in Ireland are being subjected to a process of 'regulation, discipline and control' carried out by police in accordance with state policy and laws" (p. 138). In this sense, the state has used it various institutions – the legislature to pass laws, the Court to uphold them, and the Garda (police) to enforce them – in an effort to limited women's access to reproductive autonomy. Further, as explained in more detail in chapter seven, the state has also attempted, successfully in some cases, to circumvent the potentially liberalizing aspects of supranational institutions, such as the EU, and ensure the supremacy of Ireland's comparatively nationalist and socially conservative institutions. Here Ireland's path dependency of an anti-abortion position is quite evident. As s.40(3)(3) of the *Irish Constitution* codifies a fetal right to life, Ireland has continually maintained a path echoing pro-life sentiments. This has, in turn, limited the opportunities of the Irish pro-choice movement to successfully challenge Ireland's strict anti-abortion laws.

The reasons behind the formation of a police state mentality, and in many cases physically, controlling women's reproduction are, according to Smyth, largely founded in power politics. Smyth (1992) argues that it is men's desire to control the female body and sexual reproduction that leads to legal restrictions on abortion. For example, marital rape was not criminalized in Ireland until 1990, later than the vast majority of liberal-democratic nations.[9] What better way, however, to control women's bodies and reproduction by determining when, and under which conditions, women can exercise their reproductive autonomy? Under this framework of power politics, the conditions are

[9] It should be noted that, by comparison, marital rape was outlawed in Quebec (and Canada more broadly) seven years earlier in 1983.

highly restrictive, to the point of being virtually non-existent. As the outcome of the *X Case* illustrates, women's reproductive autonomy in Ireland only exists if their health or life is at risk, and even then, these advances remain tedious and precarious. As the referenda of 1992 illustrated, there was – and remains – a movement to remove the threat of suicide as grounds for a legal abortion, suggesting that many in Ireland would rather a pregnant woman kill herself than afford her control over her reproduction. As mothers or reproducers of the nation, women then become subject to a male desire to control future populations via restrictions on abortion access.

Although this strong relationship between women and mothering in Ireland provides some of the justification used by pro-life supporters for restricting abortion access, there are also other variables that are of great importance. While the debate over reproductive rights in Ireland may largely seem to be a political battle between pro-choice and pro-life supporters over issues of abortion and the life of a fetus, a significant underlying, theoretical element cannot be ignored: a strong sense of Irish nationalism and, by extension, anti-British sentiments. As Siobhán Mullally (2005) explains, "the demarcation of gender roles in Ireland has always been intertwined with debates on national identity" (p.82).

Gendered conceptions of nationalism are not simply historic relics, as they continue to rear their head in contemporary times. Present day Ireland – at least in as much as it relates to the link between reproduction and nationalism – is a prime example. While women were granted a limited right to vote in 1919 (and expanded voting rights in 1928), other advances in full personhood and autonomy, or the lack thereof, suggest that Vickers' line of argument that women were and, in some cases, still are property of men

is especially apt when analysing Ireland. For example, it was not until 1996 that Ireland's constitutional ban on divorce was lifted in a referendum, and only then passed with the slimmest of majorities (50.28% to 49.72%, separated by just over 9,000 votes). In fact, a similar referendum to remove the constitutional ban on divorce failed by a significant margin ten years earlier. While women may have won the right to vote, to run for elected office, and terminate a marriage – suggesting an expansion of women's personhood in Ireland – the current and highly restrictive regulation of reproductive rights certainly indicates the prevalence of a continuation of gendered notions of citizenship. This regulation illustrates an important way in which women play a central role in the (re)production of nations and national identities.

In addition to Irish laws, values, and identity having a clear gendered orientation, the demarcation of national roles in Ireland has also been intertwined with an anti-British attitude. When considering the formation of Irish identity, we must note that in many ways Irish nationalism is heavily steeped in a form of anti-Britishness. In other words, Irish identity has been fashioned as an 'other' to British identity. To be Irish means also that one is not British. This sense of anti-Britishness has had important impacts on reproductive rights in Ireland.

For some Irish nationalists, abortion services offered in Great Britain signify a means by which nationalists are able to control and limit the population growth of Ireland and subvert the national project (Fletcher, 2001). For these nationalists, the very act of operating abortion clinics in England, which are accessible to Irish women, represents a way for the English to decrease the Irish population. The number of Irish women travelling to England for an abortion was 6,500 in 2001, and dropped to just under 4,500

in 2010 (Irish Times, July 7, 2010). The cost for this procedure, excluding travel and related expenses, is anywhere between £400 and £1,500 (Irish Times, July 7, 2010).

The significance of Ireland's past with England is also represented in the way that sexual liberty or reproductive freedom has been portrayed by the Catholic Church as a form of "British Godlessness" (Speed, 1992, p. 86). Practically speaking, for Ruth Fletcher (2001), a connection between 'Britishness' and abortion has been maintained by the fact that the Irish government will 'look the other way' and allow Irish women to obtain abortions in England. This practice of allowing Irish women to travel to England to have an abortion maintains the image of England as a "barbarous" as compared to a more "civilized" Ireland. Abortion was legalized in the United Kingdom in 1967, which, at that time, was one of the most liberal laws regarding abortion in all of Europe.

This act of allowing Irish women to travel to England to obtain abortions is quite perplexing as it contradicts what some argue are traditional Irish values of women as mothers. With regard to reproductive freedom and restriction, Ireland is not alone in its practice of 'othering'. That so many women are willing to seek abortions in England seems to illustrate a sense of despair at the lack of options, or opposition to, the alleged national project and women's role within it. While pro-life supporters in Ireland considered the British to be barbaric for allowing abortions to take place, in Britain it is not uncommon to hear claims of backwardness and barbarism made towards the Irish. As Clara Connolly, Catherine Hall, Mary Hickman, Gail Lewis, Ann Phoenix and Ailbhe Smyth (1995) explain:

> The British have long constructed Ireland as a backward Other. This has been a staple of anti-Irish jokes for centuries. Britain, meanwhile, represents itself, in the dominant narrative, as a liberal secular state.

> Anti-Catholicism plays a critical part in this, for popular Protestantism has always been central to English/British nationalist (p. 3).

While the topic of conflict between Protestant England and Catholic Ireland falls outside the scope of this dissertation, I believe it is relevant to at least make note of this historical tension, particularly emphasizing the ways it manifests itself in forms of anti-Irish racism. This anti-Irish sentiment has been internalized by the Irish, who in turn utilize it to foster and maintain an anti-British sentiment in Ireland, and then connect it to a nationalist critique of reproductive freedom. This, in turn, contributes to Ireland's restrictive stance on reproduction, as not merely a means to protect and advance the Irish nation, but also as an act of "anti-Britishness".

For Monsignor Denis Faul (1997) a prominent pro-life supporter in Ireland, Ireland's willingness to allow abortions of any kind signifies a movement away from traditional Irish values towards an Ireland driven by economic success and greed and the emergence of the "Celtic Tiger." If traditional Irish values are that of family life and women as mothers, then allowing women to abort fetuses and participate in the public realm signifies the decline of Irish culture. For Faul, this attack on Irish culture comes as a direct result of Irish integration within the European community. Once again it seems evident that Ireland is depicted as traditional and family centred and in this instance Europe as a whole is viewed as the corruptor.

For Irish politicians and drafters of the Constitution, a focus on Catholic values and laws based on those values, would create a form of 'Irish Laws' which would be distinct from British Law (which was based on secularism which was also distinctly non-Catholic). Ireland's restrictions on abortion access, coupled with s.40 (3)(3)'s fetal right to life, is exemplary of the type of distinctly non-British, Irish law that has been created.

The Irish Constitution, and the values contained within it, has long been central to the debate over reproductive freedom in Ireland. The passage of the *Constitution* in 1937 more broadly, and Article 40 specifically, did not directly consider abortion, which at the time was not a central plank of public policy, in any meaningful way. Since that time, however, Article 40 has played a central role in debates over reproductive freedom.

Surrounding the creation of Article 40(3) (3), a clear example of the close relationship between the Irish nationalist movement and the pro-life campaign was illustrated by the interest group, PLAC/PLC (Pro Life Amendment Campaign/Pro Life Campaign). The PLAC began as a pro-life interest group who campaigned in 1983 for the 8th amendment to the Irish Constitution, which would effectively secure the fetal right to life in Ireland. The PLAC exemplify an interest group who employed the use of an 'us versus them' dichotomy, where 'us' signified a religious and innocent Ireland and 'them' represented a barbarous England.

This tactic of creating an 'us versus them' dichotomy is a useful tool for Pro-Life interest groups such as PLAC because generates interest in a citizenry who may be disinterested in the topic of reproduction itself but who may be instigated by arguments based on Pro-Irish/ Anti-British nationalism. Smyth (1992) recounts the nationalistic imagery used by pro-life protest posters; one in particular read: 'The Abortion Mills of England Grind Irish Babies into Blood that Cries out to Heaven for Vengeance" (p.65). The imagery here is just as much about abortion as it is about nationalism and anti-Britishness. The reference to 'abortion mills' is meant to draw a parallel between British abortion clinics and the industrial image of colonial England, where English abortion clinics are tools for exploitation of Irish women. English abortion clinics are equated with

mills to illustrate that for pro-life advocates this exemplifies yet another instance of the English profiting from the exploitation of the Irish (Fletcher, 2001).

For Fletcher (2001), "Although abortion law itself does not make references to colonial history, it does construct fetal life as a public interest which is so fundamental to Irish constitutional law that it merits absolute protection" (p.578). Fletcher cites Irish Supreme Court Justice Hamilton's comments during the case of *Attorney General v. Open Door Counselling* as evidence of the life of a fetus being constitutionally significant. Hamilton stated:

> The qualified right to privacy, the rights of association and freedom of expression and the right to disseminate information cannot be invoked to interfere with such a fundamental right as the right to life of the unborn, which is acknowledged by the Constitution of Ireland (*A.G. v. Open Door Counselling*, 1993, p. 617).

The Court also stated that "any action on the part of any person endangering [the life of the unborn] is necessarily not only an offence against the common good but also against the guaranteed personal right of the human life in person" (*A.G. v. Open Door Counselling*, 1993). This notion of harm threatened towards a fetus as representative of a threat against the common good is exemplary of the way in which nationalism and reproduction are intertwined in Ireland. The termination of a pregnancy is deemed to be a matter of public interest and concern, thus suggesting that women's reproductive abilities are also a matter of public discourse. In short, abortion is a crime against the nation-state.

When considering the implications of Irish nationalism on debates over reproductive freedom, it is clear that for Irish nationalists, abortion must not be permitted not only because it undermines the growth of the Irish nation, but, at least indirectly, also because it is allowed in Britain. As Ruth Fletcher (2001) explains, "...the Irish state has

rejected the European trend towards liberalizing abortion access... this unusual stance reflects in part a post-colonial desire to construct a culturally authentic 'pro-life' Irishness in opposition to what has been perceived as a British colonial pro-choice culture" (p. 569).

Thus, for Irish nationalists, to support abortion is to be inherently anti-Irish. For Irish women, this framing of abortion as an anti-nationalist practice contains another layer of analysis, namely that if it is Irish women's duty to reproduce the Irish state then consequently, an Irish woman seeking to abort an Irish fetus is increasingly anti-nationalist. This dominant discourse in Ireland is an important variable in explaining the divergent outcomes between it and Quebec. The dominant discourse in Ireland that posits women as mothers and assigns them a clear role in the biological and sociological reproduction of the nation has had important impacts on women's role in both the public and private sphere.

Traditionally, women's role in Ireland was restricted largely to the private sphere, where they performed the nationalist tasks of child birth and child-rearing. As such, their entry into the public sphere, or more specifically the workplace, was delayed. Problematically, for Irish women, the construction of the nation in this fashion has denied the Irish women's and pro-choice movements the opportunity to forge any meaningful alliances with the Irish nationalist movement. In Quebec, however, the nationalist project was constructed differently providing the women's and pro-choice movements an important opportunity to align themselves with the growing nationalist project in the 1960s.

A further example of the exclusion of women from a prominent sphere of the public realm is illustrated by Irish women's belated entrance into the paid labour force. Although Irish Census data from the 1960s suggests that only five percent of women were employed in the labour force, Russel, McGinnity, Callan and Keane (2009) argue that these rates were actually closer to 25 percent. The European Commission supports this suggestion, stating that in 1961 women made up 26.4 percent of the paid workforce in Ireland (European Commission, "The EU and Irish Women", 2011). Women's participation in the paid labour force continued to increase, going from 40 percent in 1983 to 46.7 percent in 1998 (Russel et al. 2009, p.18). Figures for similar years are slightly lower according to the EC, however, which asserts that 34% of women were employed in 1976 and only 42% by 1997. Data from the EC for 2008 indicates that women's employment had risen to 60.5 percent (European Commission, "The EU and Irish Women", 2011). Following the recession of 2008, however, data indicates that this number dropped to 56 percent by 2010 (European Commission, "The EU and Irish Women", 2011).

O'Sullivan (2007) and Fahey (2005) argue that many women who have entered the work force are married, thus illustrating that "Irish attitudes can no longer be characterized as motherhood-centred but as work oriented" (p, 20; p. 16). For Russel (2009), the increase in the number of mothers entering the paid workforce can be directly attributed to both an attitudinal shift between 1994 and 2002 in favour of maternal employment and also by government assistance with regard to child care (however this government assistance does not compare to that of Quebec). On the other hand, despite state assistance with childcare, the number of mothers who are also employed in the paid

workforce is significantly lower than that of their child-less counterparts. Thus, it would seem that women continue to participate more in the private realm rather than the public work force.

An important factor affecting women's participation in the paid work force is the presence or absence of children. Specifically, "Women with young children are also less likely to work than those without. In 2011, the employment rate in Ireland for women varied from 85.7% for women with a husband/partner and no children to 51.5% for women whose youngest child was aged between 4 and 5 years of age" (European Commission, "The EU and Irish Women", 2011). This seems to directly contradict O'Sullivan (2007) and Fahey (2005), as data clearly illustrates that claims of an attitudinal shift from seeing women's role as evolving from mothering to workforce participant is premature, considering that the presence of absence of children is central to whether or not a woman works outside the home. Thus, clearly women's labour force participation continues to be closely intertwined with issues of reproduction.

As physical reproducers of the state, women's bodies become of particular interest where a state seeks to increase its population, as has historically been the case in Ireland. When we consider the form that Irish nationalism takes, it becomes clear that there is something inherently antithetical about Irish nationalism towards feminism. If one must also support the notion that women have a natural duty to reproduce the state to be an Irish nationalist, then to publicly support abortion could be considered anti-Irish in itself. In light of this, it becomes increasingly difficult for feminists to align themselves with a larger emancipatory project. This appears in stark contrast to the case of Quebec, where feminists gained momentum on their movement towards autonomy by joining

forces with a larger nationalist movement. This is not to suggest that feminists and nationalists should always work together towards common goals, rather it simply explains some of the additional road-blocks and lack of opportunities experienced by Irish feminists which in turn hindered their reproductive rights movement.

In contrast to the often oppositional position between Irish nationalists and feminists, the relationship between the Quebec women's movement and the Quebec nationalist movement provided an opportunity to help foster a far more liberalized reproductive rights policy in Quebec. This can also be correlated with economic modernization and progress, leading to yet another interesting comparison with Quebec. After all, views surrounding abortion became far more liberalized in Quebec in the 1960s, at roughly the same time that the province was emerging from '*la Grande Noirceur*' (the Great Darkness) and going through the Quiet Revolution. In addition to a more secular and liberalized Quebec, one of the hallmarks of the Quebec revolution was economic progress (Dickson & Young, 2005). In Quebec, however, the substance and form of nationalism, particularly as it related to the construction of women and feminist groups, was drastically different than in Ireland, allowing for an insightful comparison of the impact of nationalism on abortion policy.

Quebec Nationalism and Mothering

Balthazar's definition of nationalism as "a movement that consists of giving priority to national affiliation and to the struggle for a better recognition of the nation to which one belongs" similarly applies to Quebec (cited in Stevenson, 2006, p.8). Quebec nationalism began after the battle of the Plains of Abraham, where the French were

defeated by the British, ultimately bringing the former French colony under British rule. This led to a situation where a predominantly francophone and Catholic population were living in a defined geographical location within a broader Anglophone and protestant nation. In turn, this fostered the rise of French nationalist sentiments, allowing for the creation of the francophone province of Quebec.

In much the same way that Britain has long been constructed as 'other' to Ireland and the Irish, English-speaking Canada has similarly been constructed as 'other' by Quebec and the Quebecois. In fact, this desire to 'other' English Canada culminated in two unsuccessful attempts (in 1980 and 1995) to leave Canada and declare Quebec independent from the rest of Canada. The distinctions between English-speaking Canada and Quebec, which have long been present, "emanate from the widely held notion that [Quebec] is home to a distinctive French-Canadian nation, centred on language, ethnicity, culture, and territory, and – prior to 1960 – religion" (Dyck, 2009, p. 51).

This strong sense of nationalism, which transitioned from being "inward-looking and defensive" before the Quiet Revolution and "activist and self-confident" after it, is rooted in a historical and sociological reality, and has been kept alive and advanced through various conflicts that have highlighted a socio-political distinction between Quebec and the rest of Canada (Dyck, 2009, p. 51). In these situations, the goals and values of English-speaking Canada are at odds with those of Quebec, and these distinctions have instilled a belief in a large portion of the Quebecois that the rest of Canada is not merely different, but is 'other' and, for all practical purposes, equivalent to a 'foreign' land. Furthermore, in Quebec, the nationalist project has been centred around

(though not exclusively) a movement seeking to create a new, sovereign state of Quebec that would exist independently of Canada.

While a strong sense of nationalism has long been present amongst the populace in Quebec, the nationalist movement underwent a drastic modernization throughout the 1960s, during a period known as the Quiet Revolution. During this time, the state (led by a highly nationalist, though not sovereignist government) overtook the church as the provider of many essential services, namely health and education, as it rolled out a modern welfare-state. This, in turn, helped to facilitate a rapid secularization of Quebec, which had important effects on Quebec's demography. As John Dickinson and Brian Young (2005) explain, "Quebec's demographic evolution during the Quiet Revolution was marked by four factors: a sharp decline in the birth rate; the aging of the population; the decline in the traditional family, and immigration" (p. 307).

Between 1960 and 1970 Quebec saw its birth rate drop from 3.4 children per woman in 1960 to 2.0 in 1970; this was largely the result of the introduction of the birth control pill. For example, in 1960 only 30% of women were using contraceptives, while in 1970 this group had grown to nearly 90% (Dickson & Young, 2005). The birth rate in Quebec during the 1970s and 1980s was also influenced by the legalization of and access to abortions in hospitals, as well as in clinics operated by Dr. Morgentaler. In 1971 there were 1.4 therapeutic abortions for every hundred births and in 1986 there were 18.9 per one hundred births (Dickson & Young, 2005). Conversely, in Ireland the birth rate was 3.78 in 1960 which increased to as high as 4.04 in 1965 and was only slightly lower at 3.85 in 1970 (Central Statistics Office, Ireland, 2010).

Quebec's declining birth rate, accompanied by a rapidly aging population, resulted in decreased demand for manufactured goods and a shrinking of Quebec's domestic market (Dickson & Young, 2005). Despite a higher standard of living enjoyed by the segment of the population that was employed in the province's emerging industrial and service sectors, the combined effects of a declining birth rate and an aging population decreased the aggregate demand for new homes, as well as consumer goods such as clothing, automobiles, appliances and other manufactured goods.

The decline in the traditional family during the Quiet Revolution was a direct result of the movement away from Catholic values as well as an increased feminist presence in Quebec. With a move away from Catholicism came decreased marriage rates as many young people were choosing to live in common-law relationships without feeling a need to marry. Many of these unmarried young people were not having children, and those who decided to have children – both married and common-law – had fewer children than previous generations. In 1986, the province's birth rate had decreased even further to 1.37 (Dickson & Young, 2005). The birth rate in Ireland in 1986 was 2.44, and while a lower rate than that of the 1960s, this figure is still considerably higher than that of Quebec (Central Statistics Office, Ireland, 2010).

Included within Dickinson and Young's account of the Quiet Revolution was an increase in immigration to Quebec, which brought a variety of ethnic and cultural backgrounds, many from non-Francophone countries, which in turn brought new societal values to the province. Reasons for increased immigration to Quebec were often a direct result of a need to replenish a declining population because of the previously mentioned variables: declining birth rate, change in traditional values/decline of Catholicism, an

aging population, as well as the impact of these factors on a diminished demand for consumer goods.

For Micheline Dumont (1987) another variable impacted the growth of the Quiet Revolution in Quebec: education. Dumont argues that the Quiet Revolution had a tremendous impact on Quebec culture, with an increased availability of education which ultimately led people to question ideas and traditions, particularly those of the Catholic Church.

The Quiet Revolution impacted the women's movement more broadly speaking and the reproductive rights movement specifically by fostering an environment filled with liberalizing change. From the decline in Catholic influence on social behaviour to increased educational opportunities for young people, the Quiet Revolution changed the entire landscape of Quebec. It was this change in cultural, religious and social dynamics that created the necessary space for a successful drive for greater reproductive autonomy. Women began to question the authority of the Church and the state over their reproductive choices, and consequently they began to demand reproductive autonomy. More specifically, the spirit of modernism, progression and emancipation was in the air and needed in order to bring Quebec out of the "great darkness" that characterised the Province throughout the Duplessis era.

An important indicator of the modernization of the Quiet Revolution, especially as it related to women, was a rapid increase to women's paid employment outside the home. This stands in stark contrast to the otherwise lagged entry of Irish women into the paid workforce discussed above. This original enhanced entry into the paid workforce in the 1960s has had longstanding impacts on women's workforce participation rates into

the 21st century. In Quebec in 1961, 18 percent of women were employed in the paid labour force (Statistics Canada, 1961 Census). This represents a 2 percent increase above the national average of 16 percent female employment (Statistics Canada, 1961 Census). In 1976, 41 percent of women in Quebec were employed in the paid workforce, by 2001 this number had reached 62 percent and in 2007, 69 percent were employed (Women at Work, "Closing the Gender Gap", 2009). In 2011, 69 percent of women in Quebec were employed in the paid labour industry (Statistics Canada, Population by sex, 2011).

Like Ireland, the presence of children seems to impact a woman's ability to work in the paid workforce. In fact, in 2007, "less than 50% of single mothers with children under three years of age [were] employed. By comparison, in 2007 the employment rate of mothers in two-parent families with young children was 73%" (Women at Work, "Closing the Gender Gap", 2009, p. 8). In light of these figures, it can be suggested that the role of mothering in both Ireland and Quebec certainly impacts a woman's ability to participate in the paid workforce. Consequently, women's roles as mothers are in many ways maintained as a result of this public/private distinction. The significance of this for the reproductive rights movement is that it illustrates just how strongly women's lives are connected with and affected by reproduction. The fact that pregnancy affects a woman's ability to work in the public sphere, as well as raise her child, cannot be overlooked.

Women's entry into the paid workforce challenged the traditional public-private dichotomy, and influenced birth rates, and abortion rates, in Quebec. No longer could it be assumed that young women would simply be child-bearers and child-rearers as was once the case.

As we saw in the discussion of the history of abortion in Quebec it was Quebec juries in 1973, 1975 and 1976 that refused to convict Morgentaler for performing abortions without the consent of Therapeutic Abortion Committees (TAC's) (Weir, 1994**).** In response to these verdicts, in 1976, the Parti Quebecois announced that it refused to continue to prosecute Morgentaler (although performing abortions without the consent of a TAC was a crime under federal law, it was up to individual Provinces to hear cases) (Weir, 1994). During this time, feminist groups within Quebec continued to lobby the provincial government, with some degree of success, for improved access to abortion and complete medical coverage for the procedure (Weir, 1994; see also, Lemoureux, 1986).

This degree of lobbying was not possible in Ireland, as the political climate was not conducive to it, nor was there a government willing to listen to the pro-choice movement to the degree that they were in Quebec. Further, this lack of criminal prosecution in Quebec was in marked distinction to what would occur if someone were to openly operate outside the law in Ireland as Morgentaler did in Quebec. Certainly the authoritative institutions of the Irish state would have been put to swift use to immediately stop such an open violation of the law. It was not until 1982 when Morgentaler announced that he would open a private abortion clinic in Toronto that he was brought before the court again on charges of performing illegal abortions.

Women's groups in Quebec played an important role not only in pushing for the availability of safe abortions, but also in promoting the availability of abortions, and helping to secure their legality in a tumultuous time when their continued occurrence was in constant question. The vast majority of these groups were very nationalistic.

In comparison with Ireland, the brand of nationalism advanced in Quebec is far more progressive, worldly, and often (though not always) linked to social democracy. In such a setting, it is not surprising that women's issues play an important role in the construction of Quebec nationalism. Two Quebec-feminist groups who illustrate the connection between feminists and nationalists are the Front de liberation des femmes (FLF) and the Federation des femmes du Quebec (FFQ). For example, the FLF, a group advocating for women's rights and economic equality in Quebec, sought to align itself with the Quebec nationalist movement (Maille, 2004). Such an alliance, as noted earlier, was simply not possible in the Irish context. The FLF's discourse linked women's emancipation with Quebec sovereignty thus arguing that the goals of the feminist movement were similar to those of the Quebec nationalist movement. Both of these groups were focused on autonomy and liberation from oppressive sources of power.

In the 1990s, the Federation des Femmes du Quebec (FFQ) argued that both autonomy and identity were important to both feminists and Quebec nationalists, therefore "a coherent project which addresses the needs and aspirations of Quebecers," needed to be created, and as part of such a project, it followed that "Quebec needs to be in charge of its own development and providence" (Groupe de recherché, et d'ensegnement multidicipliaire feministe, 1991.) The goals of the FFQ were to promote women's autonomy as well as economic equality and put an end to poverty within Quebec.

For the FFQ, the idea of Quebec nationalism and sovereignty brought with it hopes for "equality between the sexes, social programs [and] guarantees of fundamental freedoms…" all of which would contribute to the quality of life of women living in

Quebec (L'avenair du Quebec sera feminine-pluriel, 1995). These goals were constructed as being mutually exclusive: women's liberation and equality could not exist without a sovereign Quebec, and a sovereign Quebec could not exist without the support of the women's movement. This relationship, however, was not simply pragmatic, and represented a genuine shared worldview and political interests, as well as an overlap of common interests.

When considering the widespread impact of the Quiet Revolution and the progressive alliance between feminists and nationalist fostered from the 1970s to the 1990s on the political culture of Quebec, we must take note of the tremendous impact of increased reproductive freedom and autonomy. By introducing contraceptive tools such as birth control and even more permanent procedures such as vasectomies, women and men alike were able to control family size and thus population size. These advancements in reproductive control also enabled women to join the workforce and public sphere more generally speaking in a greater capacity that had ever been experienced before. Many of these variables, including the movement away from Catholicism to a more secular state and an increased presence of women's voices in the public sphere illustrate a stark contrast between Quebec and Ireland.

Impact of Nationalism on Restrictive Abortion Policy

While both Ireland and Quebec may appear similar to one another in their forms of nationalism, two key factors separate these two nationalisms. They are distinguished by the occurrence of Quiet Revolution (Revolution Tranquil) in Quebec and by the complex and overlapping relationship between feminists and nationalists. Unlike Ireland,

in Quebec during the 1960s and 1970s, the previously dominant Catholic Church saw a dramatic decline of its influence over the population, as well as a turn toward more secular and liberal values.

A key distinguishing variable separating the case of Quebec from Ireland is the opportunity that Quebec feminists had to be able to align themselves with nationalist movements, an opportunity that was not experienced in the same way in Ireland. Quebec feminists during the Quiet Revolution were unique in their ability to align themselves with the nationalist project as they were both pursuing common goals of autonomy and choice. For Micheline deSeve (2000):

> Feminism and nationalism therefore can become compatible if and only if a modern concept of nation-building is adopted. The nation must be open to immigration, thereby giving the physical components of community fluidity. Such a national community would be grounded in allegiance to common values and shared cultural visions (p. 61).

As deSeve explains, the only way for feminists and nationalists to work together towards common goals is for the tie between women and reproduction to be set aside and perhaps de-emphasized. Women must be viewed as more than reproducers of the state. They must be treated as autonomous allies of nationalists in a quest for equality and recognition. While this was generally the case in Quebec, this was not however, the case in Ireland, much to the detriment of the Irish women's and pro-choice movements, and to the liberalization of abortion law. The sometimes close relationship between feminists and nationalists that was apparent at the onset of the Quiet Revolution, however, began to move apart as the mid-1970s took shape. As Dumont (1987) explains, this relationship between feminists and nationalists was, for feminists, a relationship of utility which grew apart as the Quiet Revolution slowed down and feminists took on a more radical image.

As early as 1975, feminists began to form their own unique agendas that were independent from the goals of nationalists, focusing primarily on uniquely women's issues such as reproduction and equality for women in the public sphere (Dumont, 1987).

Returning once again to the work of Yuval Davis, instead of speaking of gender and nation as completely autonomous concepts, her dichotomy suggests that we must often consider the two as closely intertwined. This is not to suggest that scholars can always speak of gendered nations as homogenous entities. On the contrary, Yuval-Davis (1997) argues that the relationship between gender and nation or nationalism changes across time periods as well as political and geographical climates. A question raised by Yuval-Davis (1997), as well as Vickers (2002), is whether or not gender and nationalism must always be antagonistic, or are there instances where women's groups have employed or cooperated with nationalism to pursue their goals?

In response to Yuval-Davis' discussion of gender and nationalism, Vickers suggests that when considering the history of feminists and nationalism, some evidence suggests women cooperated alongside nationalist projects in order to meet their own goals. Citing the example of Franco-Quebec feminists during the Quiet Revolution of the 1960s, Vickers (2002) argues that Quebec-based feminists allied themselves with Quebec nationalists as a means of furthering their own goals. This 'progressive' form of nationalism in Quebec represents an important distinction between the way that nationalisms are or are not gendered when comparing Quebec and Ireland. Certainly the link between nationalist movements and women's movements in Quebec managed to manifest itself in a very different fashion from Ireland.

In the case of Quebec, however, it may be more appropriate to view the relationship between the women's movement and the nationalist movement not as closely intertwined (Yuval-Davis, 1997) or in co-operation with one another, but rather, as fully intergrated with one another. Lamoureux (2001), for example, recounts the Quiet Revolution slogan, "no Quebec without the liberation of women, no liberation of women without a free Quebec" (p. 87). In this case, the women's movement was not simply a proponent of the nationalist project and the nationalist projected was not simply inclusive of the women's movement, the nationalist project itself was gendered.

As both Micheline deSeve (2000) and Diane Lemoureux (2001) explain, nationalist and feminist movements both contributed to the de-traditionalization of Quebec during the Quiet Revolution and beyond. For nationalists and feminists alike, there existed a common goal of modernization and progressive movement towards an independent Quebec. The same, of course, is not true in regard to the women's movement and nationalism Ireland. Further, the women's movement in Quebec, partially as a result of their participation in the national project, was far more politicized than women's movements in English Canada. Milne notes that throughout the late 1960s and well into the 1970s, "Quebec women were engaged in politics unlike women in the rest of Canada and radical feminism was tied to the powerful national liberation movement. Many francophone women did not identify with the universal category of women but as Quebec women, feeling doubly marginalized, as women, and as Quebecers" (2011: 17).

As a result, in Quebec, nationalists, as well as feminists, participated in the Quiet Revolution, which led Quebec state and society (and by extension public policy) in a direction away from the Catholic Church, as well as away from forms of male dominated

political action. It was the quest for autonomy, of both the nation and the women within it, which served as a common interest for feminists and Quebec nationalists during the 1960s and 1970s that helped to integrate the two movements into an effective gendered nationalist movement. In regard to access to legalized and safe abortions in particular, Milne has asserted that "in Quebec, the issue became intertwined with national liberation and the movement took a course that was different from the rest of Canada" (2011: 16).

If we compare this approach to nationalism in Quebec to that of Ireland it seems clear that there is certainly something unique about the way that Quebec feminists and nationalists supported one another, largely to the point of being one-in-the-same operating as an integrated movement. The previously noted slogan, "no Quebec without the liberation of women, no liberation of women without a free Quebec," exemplifies the integrated nature of the movement: feminists could not be free from a traditional and conservative Quebec without changing the very face of Quebec, and Quebec nationalists could not be free from a traditional and conservative Quebec without changing the very face of women. In this sense, and much like Vickers argued, nationalism in Quebec was gendered, but gendered in a direction that was drastically different from the vast majority of most nationalist movements, such as the predominant strand of the Irish nationalist movement, which tend to be both conservative and patriarchal.

This is not to suggest that Quebec Nationalists and feminists were in complete agreement on all issues. It does, however, offer an example of feminists working within a nationalist framework for common and progressive goals, a situation which does not occur in the same way in Ireland. In contrast to the case of Irish nationalism, the goals of Quebec nationalists were often those of autonomy and choice, goals which could easily

be shared by feminist groups, and provide important overlap and helped to reinforce one another. On the other hand, it could be suggested that Irish nationalism is closely intertwined with Catholicism and traditional values, both of which the gendered nationalist movement in Quebec spoke out against during the Quiet Revolution. Both Catholicism and its related traditional values are quite often counterintuitive to the interests of the women's movement more generally, and reproductive autonomy in particular. This then begs the question, is it possible to be both an Irish nationalist as well as pro-choice supporter?

In an attempt to work within existing belief systems in Ireland, one pro-choice group, Youth for Choice, drew heavily upon Irish history and folklore as a way of arguing in favour of abortion. As part of their campaign for women's reproductive choice, Youth for Choice invoke the folklore stories of St. Brigid, who was believed to have performed abortions in Ireland. St. Brigid's image is of a female saint who is believed to be associated with fertility, as well as the termination of dangerous pregnancies. One particular depiction of St. Brigid recounts a tale of a young woman who turns to St. Brigid during a difficult pregnancy. St. Brigid is said to have prayed and then placed her hands on the abdomen of the young girl, which in turn caused the fetus to disappear (Ruane, 2000).

What is particularly interesting about the invoking of St. Brigid is that she was a figure within Celtic Christianity and therefore pre-dates colonialism in Ireland, thus suggesting that abortion could be a considered a truly Irish practice because it took place prior to British colonization. As Fletcher (2001) points out, the strategy of Youth for Choice is to make abortion an Irish practice only if it is considered pre-colonial. While

this has provided a pro-choice group with an opportunity to advance a more liberalized policy toward abortion, it falls within the confines of an existing nationalist project, which delineates the discourses that can be utilized. In short, the existing dominant public policy has limited the opportunities for pro-choice movements.

Notably that the nationalist sentiment found in Youth for Choice's rhetoric overshadows discussions of freedom, liberty, and equality for women. A woman's right to an abortion is not a desirable in itself, but is instead permissible because of a link to Irish history and a pre-British era. Youth for Choice's approach here represents the ways that Irish feminists have attempted to work within the pre-existing framework of Irish nationalism, rather than work in opposition to it. This is perhaps reflective of a common situation in which, as David S. Meyer notes, while "…committed activists may always be trying to mobilize on behalf of their causes, savvy ones adjust rhetoric, focus, and tactics to respond to political circumstances" (2004, p. 129). Certainly the rhetoric of Youth for Choice and their focus on Irish history and folklore (and not women's autonomy and freedom) is reflective of this strategic prioritizing.

When comparing the cases of Ireland and Quebec, it becomes apparent that while Irish nationalism is often antithetical to feminism, in Quebec, feminists often allied themselves with the nationalist movement along common principles of sovereignty and autonomy. In Ireland nationalism is widely based on anti-British sentiments, particularly in opposition to supposed liberal British values, especially where issues of women's reproductive rights are concerned. If Irish identity is constructed in opposition to the British "other" then it is only logical that if British reproductive rights policies are considered liberal then consequently, Irish policies must be conservative or restrictive.

Thus, if for Ireland nationalism means anti-Britain and consequently anti-reproductive freedom, it becomes increasingly difficult for feminist groups to align themselves with Irish-Nationalist agendas. Furthermore, in keeping with the theme of motherhood and Irish nationalism it would seem paradoxical for an Irish feminist group promoting reproductive freedom to align itself with a form of Irish nationalism based on women as mothers. As has been previously noted, womanhood and mothering are considered to be quite interconnected for many within Ireland, therefore to reject motherhood would for some be considered anti-feminine.

Emphasizing the connection between Franco-Quebec feminists and Quebec nationalists, Vickers (2002) explains that "Franco-Quebec feminists have moved away from private, familial, and religious defences of language and identity toward a secular, state-based approach" (p. 261). This case of Quebec feminists allying themselves with a nationalist project illustrates that the relationship between feminists is not necessarily antithetical to nationalism. Indeed, it may be possible for feminists to pursue an agenda which advocates for the advancement of women's rights from within a nationalist framework. Of course, the direction of nationalism is much different in Quebec than it is in Ireland, despite other similarities between the two countries.

Conclusion

Returning to the original question fuelling this chapter, is nationalism the primary variable which explains a jurisdiction's stance on abortion? In the case of Ireland, nationalism certainly created difficult conditions for Irish feminists; however, it did not completely prohibit feminist action towards greater reproductive freedom. While in

Quebec, feminists were able to work alongside a larger nationalist project, in Ireland, feminists have found it necessary to forge ahead in spite of Irish nationalists, often pursuing abortion access abroad. Due to Ireland's geographical location and close proximity to the U.K., pursuing abortion access abroad through creating greater rights for education and travel has proven to be a successful starting point for Irish feminists. If nationalism cannot be held accountable for Ireland's backward position on abortion then perhaps this is explained by another variable? Perhaps it is the conservative, Catholic values held within Ireland that explain its restrictions on reproductive rights?

Chapter 6: Catholicism and Reproduction in Ireland and Quebec

> Public representatives will be asked to decide whether a caring and compassionate society is defined by providing the best possible care and protection to a woman struggling to cope with an unwanted pregnancy or by the deliberate destruction of another human life. I hope that everyone who believes that the right to life is fundamental will make their voice heard in a reasonable, but forthright, way to their representatives, reminding them that the right to life is conferred on human beings not by the powerful ones of this world but by the creator. There is no more important value than upholding the right to life in all circumstances (Cardinal Sean Brady, 2012).

In the aftermath of Savita Halappanavar's death, on December 24th, 2012, Irish Cardinal Sean Brady made the above statement in an attempt to bolster the pro-life position of the Catholic Church in Ireland. The actual impact of his speech was to create a tremendous debate from both sides, with many from both sides criticizing the Cardinal for making such a speech on Christmas Eve.

Having found that nationalism on its own cannot explain the divergent policies in Ireland and Quebec, I turn my attention to another separate, yet related variable: the role of the Catholic "Church". Indeed, these two variables are actually quite interconnected as it was Ireland's strong Catholic values which fuelled many of its nationalist sentiments, particularly those formed in opposition to Protestant Britain. Thus, it is necessary to ask, is Ireland's refusal to allow for safe and legal abortions a direct result of its conservative, Catholic values? In what ways have Catholic values shaped other populations reproductive rights policies, such as those in Quebec? To what extent do Catholic roots shape a state's position on abortion?

At first glance it may seem as though traditional Catholic, anti-abortion values are surely the key variable needed to explain Ireland's restrictions on reproductive rights. On

the contrary, however, the impact of Catholic values on abortion in Ireland is anything but clear and obvious. As a historically and predominantly Catholic state, Ireland is certainly home to many individuals who are strongly opposed to abortion on grounds of religious principles. To determine if Catholic values are the principle cause for Ireland's restrictive stance on abortion, I first consider the historical as well as present position of the Catholic Church on abortion. Second, I offer an outline of the manifestations of Catholic values and their influence on reproductive rights in Ireland. Third, I discuss the various pro-life, Catholic based interest groups housed within Ireland, emphasizing their impact on Irish abortion law. Fourth, I consider the case of Catholicism in Quebec as a means of illuminating the very different ways that two Catholic populations have addressed the abortion question. Here I consider both Catholic values in Ireland broadly speaking, as well as their manifestations by pro-life interest groups. I conclude by offering a comparison of Catholicism's impact on reproductive rights in both Ireland and Quebec.

Theoretical Foundations for Catholic Positions on Abortion

Drawing upon the work of Aristotle in his *Politics*, and later St. Thomas Aquinas' theory of embryonic animation, it had been at one time argued that human embryos do not contain a soul at the moment of conception. Thus, prior to 'the beginning of the senses' abortion was permitted. Specifically, for Aristotle, abortion was permitted in certain situations, particularly where:

> As to the exposure and rearing of children, let there be a law that no deformed child shall live, but that on the ground of an excess in the number of children, if the established customs of the state forbid this (for in our state population has a limit), no child is to be exposed, but

> when couples have children in excess, let abortion be procured before sense and life have begun; what may or may not be lawfully done in these cases depends on the question of life and sensation (Aristotle, 22-25).

According to Aristotle, abortions were permitted in instances of fetal abnormality and also where families were already too large (according to the ideal family size). With regard to the question of when human life begins, in his *History of Animals* Aristotle (350 B.C.E.) argues that where a male embryo is concerned ensoulment takes place at forty days past conception and for female embryos ensoulment occurs at ninety days (Book 7, Part 3). Specifically, Aristotle (350 B.C.E.) explains that:

> In the case of male children the first movement usually occurs on the right-hand side of the womb and about the fortieth day, but if the child be a female then on the left-hand side and about the ninetieth day…About this period the embryo begins to resolve into distinct parts, it having hitherto consisted of a flesh like substance without distinction of parts (Book 7, Part 3)).

St. Augustine (420 AD) also presented a theory of delayed ensoulment, particularly when he stated: "The law does not provide that the act (abortion) pertains to homicide, for there cannot yet be said to be a live soul in a body that lacks sensation" (On Exodus 21-22). Augustine did not, however, condone abortion. Since Augustine distinguished between a "pre-vivifed" and "vivified" fetus, he suggested that while abortion of a pre-vivifed fetus was morally evil, it could not be considered an act of murder.

In summary, for Aristotle, Augustine and later Aquinas, both of the latter following an Aristotelian tradition, a human soul did not exist in an embryo until after a period of forty or ninety days (depending on sex), thus it was permissible to abort a fetus that did not contain a human soul. Under Canon law this became known as a distinction

between fetus animatus (with a soul) and fetus inanimatus (without a soul) (Ranke-Heinemann, 1990).

Until 1588, "Only the abortion of an animate foetus was punishable by excommunication, and, since it was impossible to ascertain the sex of a fetus, that penalty had not been applied to abortion until after the eightieth day" (Ranke-Heinemann, 1990 p. 275). In 1588, Pope Sixtus V issued a papal bull 'Effraenatam' threatening to punish abortionists with excommunication from the moment of conception. This bill was overturned by Pope Gregory XIV in 1591 (Ranke-Heinemann, 1990). However, the Catholic Church followed this notion of delayed ensoulment until 1620 in accordance with Aquinas, suggesting that early into gestation a fetus did not contain a human soul. Catholic notions of when human life begins changed in 1620 when the physician, Thomas Fienus, argued that the human soul filled the embryo at three days gestation. Later in 1661, Pope Innocent X's physician, Paul Zacchias, argued that the soul fused with the embryo at the moment of conception (Ranke-Heinemann, 1990). Nearly 200 years later the number of abortions recorded began to rise. Between 1840 and 1860 the number of abortions performed increased dramatically as abortion laws were often vague and in many cases only applied after quickening (approx. 4 months gestation) (Mohr, 1978).

As a result of the increased number of abortions being performed, many states began to formally create legal barriers to abortion. It was not until 1869 (8 years after the British *Offences Against the Person Act*) when Pope Pius IX formally removed the distinction between fetus animatus and fetus inanimatus, arguing that the fetus contains a soul from the moment of conception, that all abortions were outlawed by the Catholic

Church (Ranke-Heinemann, 1990). This change in stance illustrates that while the Church currently outlaws abortion in all instances, this has not always been the case. To suggest that Ireland is more restrictive of reproductive rights solely based on Catholic values is a flawed argument, considering the history of abortion under the Church.

The Irish Catholic Church and Reproduction

At present the Catholic Church's most recent official position on abortion is based on the 1974 *The Declaration on Procured Abortion.* Here, the Catholic Church emphasises that within its *Declaration on Procured Abortion* it is stated that: "You shall not kill by abortion the fruit of the womb and you shall not murder the infant already born" (Declaration on Procured Abortion, 1974). In 1974, when outlining its position on when life begins, the Church stated:

> In reality, respect for human life is called for from the time that the process of generation begins. From the time that the ovum is fertilized, a life is begun which is neither that of the father nor of the mother, it is rather the life of a new human being with his own growth. It would never be made human if it were not human already (Declaration on Procured Abortion, 1974).

Following the teachings of the Catholic Church, Irish Catholic women are encouraged to refrain from obtaining an abortion on religious grounds, a point that the state institutions have certainly played an active role in advancing and enforcing.

The strength of the Catholic Church in Ireland was clearly displayed in 1995 when Michael Noonan, the Minister of Health under Fine Gael (the largest and most conservative Irish party), introduced the *Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill* (Girvin, 1996). This Bill came after one

previously drafted by the former Minister for Health, Brendan Howlin (a member of Fianna Fáil) in 1994. In 1994, the proposed Howlin Bill outlined that "doctors and counselling agencies would not be prohibited from making an appointment for a woman at a British abortion clinic, nor would they be prevented from providing the woman with a letter of reference" (Girvin, 1996, p. 177). After the fall of the Fianna Fáil government and replacement by Fine Gael, the new Bill was far more restrictive as it "prevented a doctor or counsellor from making any arrangements for a patient or client with an abortion clinic outside the state; the legislation did not however, prohibit a doctor from giving a patient phone numbers or addresses of such abortion clinics" (Girvin, 1996, p. 179).

Following the proposed Bill, criticisms presented themselves from political actors as well as religious authorities within Ireland, illustrating the staunch Catholicism by influential individuals within Ireland. For example, a Judge of the High Court, Justice Rory O'Hanlon compared the Bill with the "horrors of Nazi Germany" as it would facilitate the potential termination of several pregnancies (Girvin, 1996, p.180). For O'Hanlon, all law in Ireland must conform to the teachings of the Catholic Church and, in his opinion, the *Constitution* of Ireland also guaranteed protection for the right to life of the unborn as it is based on the teachings of God.

O'Hanlon was not alone in this opinion, as the Archbishop of Dublin also felt that Irish law should be theocratic. More specifically, O'Hanlon claimed that, "law making power is derived not from the State or the people of the State but from God" (Girvin, 1996, p. 180). Another Irish religious figure to oppose the Bill on religious grounds was the Bishop of Cloyne, who pointed out that Article 2272 of the Catechism of the Catholic

Church stated that the penalty for providing or cooperating with an abortionist was excommunication from the Church (Girvin, 1996).

Although the above mentioned individuals opposed the Bill on religious grounds, when it came time for the Irish government to decide on legislation, the Bill was passed with ease (the only amendment was a clause which allowed doctors to opt-out if they did not wish to give information on abortions.) As the then Minister for Justice argued, although the Catholic Church was free to offer an opinion on the Bill (and many pro-life groups certainly lobbied against the Bill), the Church and State were separate institutions in Ireland and therefore the Church's influence stopped at opinion sharing (Girvin, 1996).

Manifestations of Catholic Values in Ireland

Although there is theoretically an official separation of Church and State in Ireland, in practice the Church seems to have a considerable amount of influence over Irish laws. For example, Ireland's protection of the right to life of the unborn (s.40 (3) (3)) could be closely attributed to Catholic values against abortion. Writing as a critic of the influence of the Catholic Church on the women's rights movement in Ireland, Ailbhe Smyth argues that the connection between Ireland's largely pro-life position on abortion and the teachings of the Catholic Church are inseparable. Critiquing the Catholic Church in Ireland, Smyth notes that:

> [The Church] is a well-funded and largely secret pressure group who do not hesitate to use the most sinister tactics in seeking to conserve the moral 'purity' of Ireland, bastion of conservative Catholicism in the western world…The Catholic Church in Ireland has developed a foetocentric rhetoric and ethics from which any acknowledgement of the needs of pregnant women has been exorcised (1992, p. 21-22).

For Smyth, the Catholic Church's focus on the value of the life of the unborn and failure to give recognition to the life of a pregnant woman represents a significant threat to the women's rights movement in Ireland more broadly speaking. This conflict between fetal rights and women's rights has remained at the heart of abortion debates in Ireland, as Irish feminists are often hindered in their attempts to create greater reproductive autonomy for Irish women as they cannot escape the legal protection afforded to fetuses. Where Irish feminists would prioritize a woman's rights as an actual participating, public being, the nationalists and Catholics would prioritize the fetus.

If Catholic values surrounding the beginning of life are the cause for Ireland's continued criminalization of abortion, the decline of Catholic values in Ireland experienced during the 1990s may signify the first step towards a liberalization of abortion laws. For some, including Isabelle Matte, evidence suggests the 1990s signified an era of Catholic decline in Ireland. Matte (2007) further suggests that this decline in religiosity came as a result of the following variables: two baby booms (one in the post-war era and another during times of economic success in the 1990s), increased individuality, and the Irish Catholic scandals.

Theoretically, when considering cases such as those of Ireland and Quebec, it has been argued by political theorists such as Charles Taylor (1992) that with economic prosperity and success comes increased individualism. Thus, it can be argued that as Ireland became more prosperous during the 1990s, the era of the 'Celtic Tiger' brought with it increased individualism and, subsequently, a turn away from cultural and religious institutions such as the Catholic Church. This is also indicative of a growing population of young people, many of whom may question the values of the generations before them.

The second baby boom which occurred as a result of economic prosperity in the 1990s has now created a large population of young people coming of age in an era of increased globalization via membership within the EU as well as new forms of media technology. The significance of increased media and communication technology is that it grants individuals far greater access to information than has ever previously existed. The improved presence of online information sharing and even public forums gives Irish women a higher degree of intellectual independence and knowledge than ever before.

Coupled with this increased independence and knowledge is a growing disillusionment with traditional institutions, such as the Church, especially in light of the Church scandals of the 1990s. The first 'church scandal' to appear in the 1990s was the case of Eamon Casey, the Bishop of Galway, who had fathered a child in 1974 with an American divorcee. It should also be noted that Casey fathered this child while he was the Bishop of Kerry (Matte, 2007). Another church scandal occurred in 1994, when a "Priest died in a gay sauna in Dublin" (Matte, 2007, p. 24). Also in 1994, Father Brendan Smyth's paedophilia became a matter of public knowledge, causing even further crisis for the Catholic Church. Finally, after his death news came to public attention that Father Michael Cleary had fathered a child with his housekeeper, while as a Priest he taught of celibacy within the priesthood (Matte, 2007, p. 24).

These cases clearly illustrate the flaws in the perception of the Catholic Church as a morally superior body. If members of the Priesthood itself were unable to closely follow the very teachings that they were sharing with others, then why would the average person follow the tenets of Catholicism? As Matte (2007) argues, "Not only [were the scandals] a symbol of the collapse of the moral monopoly of the Catholic Church in

Ireland, the beginning of the end of massive Church attendance, but it also set the stage for the transformations of the Celtic Tiger era" (p. 24). In 2005, the Ferns Report, which concluded a government inquiry into allegations of child abuse by priests and others, brought to light over "one hundred cases of sexual abuse involving twenty-one priests of the diocese between 1962 and 2002" (Matte, 2007, p. 25). What was unique about the impact of the Ferns Report was that because it was a systematic government inquiry into Church activity, the separation of Church and State in Ireland could not be clearer.

Subsequently, as Catholic values begin to decline in Ireland, it is possible that increased acceptance of abortion could follow suit. As Irish abortion law has illustrated by attempting to clarify in which cases abortion could be justified under Irish law, it would seem that a sort of pressure for liberalization has already begun.

Irish Catholic Based Pro-Life Interest Groups

The range of players in the pro-life movement in Ireland is diverse, including groups such as: Neart, Holy See (the Vatican), SPUC (Society for the Protection of Unborn Children) who later became the Pro-Life Amendment Campaign (PLAC) and the Catholic Church more broadly speaking, all of whom argue that pro-choice interest groups are 'anti-family' and seek to disrupt traditional Irish values (Mullally, 2005). Broadly speaking, these all serve as examples of counter movements to the Irish pro-choice movement (Meyer and Staggenborg, 1996). The Holy See represents the voice and positions of the Catholic Church as they extend outside the Vatican itself. In other words, the Holy See is the embodiment of the position of the Pope. Thus, the Holy See represents the values of Catholic individuals living in Ireland, as it embodies the values

of all Catholicism broadly speaking. In fact, in 1994 at the Cairo Conference on Population, Holy See promoted and maintained its position that it would not support any language in United Nations declarations which made reference to safe abortions. At present, for Holy See and the Vatican, abortion is in all instances unsafe for the fetus (Haussman, 2005). Furthermore, the conference's mention of the term "unwanted pregnancy" was rejected by Holy See because, as Melissa Haussman (2005) points out, "the Vatican's definition was that every pregnancy was wanted (by God)" (p.157).[10]

Following the comments made at the UN, pro-women's rights groups in Ireland began to mobilize in preparation for the Beijing Conference on women's rights and in response to the growth of these groups, Neart (which means strength or might in Gaelic), was formed. Neart's goals were to defend Ireland's customs which included the tradition of protecting women's roles in the home or private sphere (Mullally, 2005). Like Neart, for members of Holy See, the Beijing Declaration's discussions of reproductive rights are too individualistic, thus conflicting with communitarian, Irish values (Mullally, 2005).

The Holy See came to the defence of Ireland's prohibition on abortion precisely because Ireland is often criticized for its reproductive rights policies in the international community. The Holy See argued that the Beijing Conference's focus on women's reproductive rights neglected the Irish conceptualization of family life and women as mothers as essential to Irish identity (Mullally, 2005). At the Beijing Conference, Holy See maintained its "anti-abortion in all circumstances" position but took on a less active role that at the previous year's conference.

[10] Here Haussman notes that at this point in the Cairo conference many Catholic States, including Ireland, had already chosen to abandon the Vatican's narrowly defined position on abortion.

The Holy See's position is rather interesting because of the fact that abortion has not always been outright prohibited by the Catholic Church. As noted in the previous chapter, it was not until 1869 that Pope Pius IX removed the distinction between fetus animatus and inanimatus and forbade all abortions. Prior to 1869, abortions that took place before the onset of quickening were not deemed to be cause for excommunication. The shift toward the outright ban on abortion (that is upheld today) by the Catholic Church took place in the 1860s as a response to an increased number of abortions taking place, as many states did not have official abortion laws.

The Society for the Protection of Unborn Children (SPUC) is another pro-life group made up largely of conservative Catholic members. The SPUC was founded in June of 1980 in response to the (partial) legalization of contraception in Ireland (Mahon, 2001). Fears of further liberalization of women's reproductive rights led the SPUC to form the PLAC in 1981, which led to a campaign to amend the Irish constitution to include a fetal right to life. The PLAC actively lobbied government officials to support the amendment to the Irish constitution protecting the right to life of the unborn. They also distributed pamphlets and make their position known to the media at times hosting speaker series calling upon members of the pro-life community to share their opinions ("Pro Life Campaign" 2013).

The PLAC is an Irish based group that has been quite active in defending an important role for women as homemakers and mothers. As such, they have actively argued against abortion. The SPUC created the PLAC when it petitioned the Irish High Court to further restrict abortion access on the grounds that abortion is a "violent colonial tool…which threatens the integrity of the Irish Nation" (Mullally, 2005, p.90). Here, the

overlap between nationalism and Catholicism is clear. The PLAC (now called the Pro Life Campaign, PLC) currently serves as an umbrella organization for 14 other Pro-Life/Anti-Choice organizations. The actions of the PLAC (as outlined in Chapter 3), when discussing S. 40(3)(3) of the Irish constitution, were successful in guaranteeing the right to life of the unborn, thus preventing any liberalization of reproductive rights in Ireland. It should also be noted that PLAC's/PLC's arguments against abortion reinforce the argument that anti-abortion policies are also closely intertwined with nationalism as well as Catholic values.

In Ireland, pro-life/anti-choice groups such as the SPUC or PLAC/PLC are highly organized and centralized groups whose efforts led to the creation of a constitutional right to life of the unborn in Ireland. In 2011, the PLC gained official NGO status before the UN, thus allowing them to take part in various conversations throughout the UN in a consultative relationship. Pro-life groups are active in drawing upon the media to share their opinions in the newspapers as well as via online blogs and forums. What is most striking, however, is that the executive of the PLAC/PLC is largely made up of Irish women, thus raising the question, are Irish women in favour of Ireland's restrictive abortion laws? In fact, the PLC's executive currently contains eight permanent members, five of whom are women. Perhaps by the fact that a number of women belong to the PLC suggests that Irish women are largely divided over issues of reproduction, thus creating a potential limitation to some feminist actions towards greater reproductive rights.

Linda Connolly, for example, argues that Catholic women were active in the feminist movement, albeit in a way which some may consider contrary to most feminist actions. For Connolly (2005) Catholic nuns in Ireland promoted women's independence

and education in ways that resemble traditional feminist movements. She further argues that this type of traditional, Catholic feminist mobilization must not be ignored when considering the presence of a women's movement in Ireland. Both traditional and radical forms of feminism warrant consideration here as each has contributed to the larger picture of abortion rights in Ireland.

Quebec and Catholicism

In contrast to a gradual decline in Catholic values experienced in recent years in Ireland, in Quebec, a similar trend began as early as the 1960s. Specifically, as of the year 2000, only 20 percent of Quebec residents interviewed by the CBC claimed to attend Catholic Mass weekly (CBC, 'Quebec Catholics', 2003). This appears in stark contrast to former polls from the 1950s which indicated that 88 percent of Quebec residents attended weekly mass (CBC, 'Quebec Catholics', 2003). If Quebec began to reject conservative Catholic values as early as the 1960s, while Ireland remained quite Catholic well into the 1990s (92 percent of people living in Ireland in 1991 surveyed by Welsley Johnston claimed to be Catholic), which factors account for this phenomenon (Johnston, 2001)? Furthermore, what does the difference in the shift in levels of religiosity tell us about each of these cases?

At this point it seems useful to highlight some interesting comparisons between Quebec (a predominantly Catholic and nationalist Canadian province), as a means of further exploring the relationships between nationalism, Catholicism and abortion access. Like Ireland, Quebec's population was historically largely Catholic, with ninety percent of the population coming from Catholic backgrounds and presently maintaining

nationalist sentiments (Matte, 2007). As Maureen Baker (2008) explains, "In…Quebec, both the Catholic Church and state officials urged citizens to marry young and reproduce for the good of the nation" (p. 73). Also, like Ireland, Quebec, is also a former British colony.

Citing the work of Charles Taylor, Isabelle Matte (2007) argues that individuals living in Quebec as well as Ireland should be considered "oppressed populations in which a cultural identity is founded on the Catholic religion and its Church" (p. 22). For Taylor and Matte, the Quebecois and the Irish share a common past of suffering at the hands of the British, thus creating a form of community tie based on a common feeling of anguish which also translates into a desire to belong to a culture which is deemed un-British, namely the Catholic Church. This post-coloniality experienced by both Ireland and Quebec is often manifested by an anti-British, pro-Nationalist project, exemplified by the Quiet Revolution slogan of "*Maître chez Nous*," or "Masters of our own house." As a minority culture within Canada, Quebec nationalists have argued that French-Canadian women living in Quebec have a duty to reproduce the French-Canadian Nation (Baker, 2008). Despite this, abortion access is – and has been for some time – far more liberal in Quebec.

In 1969 in Quebec therapeutic abortions performed in hospitals were legalized (Baker, 2008). In 1976 abortions in private clinics in Quebec were also virtually legalized as the Parti Quebecois announced that as a result of Morgentaler's repeated jury acquittals, the Quebec government would no longer prosecute Doctors who were performing safe abortions (Rebick, 2005). Whereas in Ireland, hospitals are not permitted to perform abortions, in Quebec women are able to obtain the procedure in hospital or a

private clinic (post 1988) where in most cases abortions are paid for by provincially funded health care ("Morgentaler Clinic Online", 2012).

While in Ireland, nationalism and birth rate increases are encouraged by failing to provide access to safe, affordable abortion access, in Quebec during the 1960s, the provincial government began a program of offering monetary incentives to women who chose to have children (Baker 2008). After a great deal of lobbying by the Quebec Women's movement, the Quebec government has also created a provincial day-care program where day-care is available to all parents at a cost of $7 per day (Baker, 2008). Furthermore, in March of 2010 Quebec became the first and only jurisdiction in North America to provide, provincially paid in-vetro fertilization procedures for women seeking to become pregnant. The Quebec government has agreed to pay for up to three in-vetro treatments per woman, a service which is estimated to cost the province $80 million (CBC, "Quebec to Fund" 2010). It is believed that the introduction of provincially paid for in-vetro fertilization will decrease medical costs to pre-mature infants by up to $30 million (CBC, "Quebec to Fund", 2010).

There seems to be a significant difference between a strategy of offering monetary incentives to have children and providing cost effective day-care as opposed to prohibiting the termination of a pregnancy. Where Quebec offers positive incentives for child-rearing, Ireland has chosen to criminalize abortion. Does the comparatively earlier decline in Catholic values in Quebec explain its position toward abortion?

Isabelle Matte provides a clear explanation for what she argues has been a strong decline in Catholicism in Quebec. Between 1960 and 1970, Catholic Church attendance in Quebec dropped from eight-five percent to only forty percent (Lemieux & Montminy,

2000). For Matte (2007), Quebec's decreased religiosity can be attributed to: the baby boom; changes in education; changes in the socio-economic structure of Quebec; increased individuality as well as changes within the Catholic Church itself. According to Matte, the baby boom led to the formation of a generation of people who felt as though they had risen to wealth from nothing. Parents who lived through the Great Depression and the War era were then raising children in a time of prosperity.

Educational changes in Quebec during the 1960s included the creation of a public system of universities, as well as the creation of CEGEPs, and finally the secularization of education generally speaking. The creation of CEGEPs (colleges that provide a two year program intended to act as a bridge between high school and university) as well as the creation of public universities in Quebec came as the result of the Parent Commission of 1964, which was created to study the successes and limitations of education in Quebec (Matte, 2007).

Increased prosperity coupled with a growing middle class during the 1960s led to a group of baby boomers who "arose, carving a place for themselves replacing the dwindling numbers of clerics and religious orders in the management of reformed institutions" (Matte, 2007, p. 23). Many of the interviewees included in Matte's (2007) study claimed that due to work and family obligations they were often too busy to attend Mass. Once again, the theme of individual interests clashing with traditional Catholic values played a contributing role in the movement for reproductive rights in Quebec. As Quebecers became more involved with their own personal lives, thus moving away from the Church this made room for an increased liberalization of values in Quebec.

Matte equates an increased interest in individual welfare in Quebec directly with the fall of Catholicism and to some extent communal ties. Personal choice becomes a central focus of many people's lives and the restrictive teachings of the church become at times smothering. From her interviews with residents of Quebec who lived through the Quiet Revolution, Matte (2007) deduced that "[when considering] baby boomers in Quebec…if they were still going to mass, or [being] married in churches, or [having] their children baptised, it was seen as a personal choice" (p. 28). If religion provided a form of community belonging, it would seem that during and after the Quiet Revolution, people living in Quebec were and are living in an era in which individuality has taken precedent over a sense of community. In other words, an era of increased liberalism took the place of a formerly Catholic nation.

The final element which Matte argues was a contributing factor to the decline of religiosity in Quebec during the 1960s was changes in the Catholic Church itself. In the 1950s and 1960s, the Vatican II Council modernised religious practices in an attempt to make Catholicism more accessible to new members of the faith. The result of this modernisation was a shift which made Catholicism seem closer to Protestantism, thus upsetting some staunch Catholics. Also, *Humanite vitae emcyclical*, which followed Vatican II in the summer of 1968, maintained a position of strict Catholic moral principles thus disappointing some Catholics who had hoped for a more liberalised position on contraception and sexual morals (Matte, 2007).

As an interest group, the Catholic Church has historically had a tremendous influence on discourses of reproduction both in Ireland and Quebec. As the above discussion explains, the influence of the Church has gradually decreased over the past

twenty years as a result of increased globalization, education, changing societal values, changes in the status of women politically as well as controversies within the Church itself. This may be especially so in Quebec, where "antiabortion activists have been bitterly disappointed by the lack of institution support from the Catholic church" (Mayer and Staggenborg, 1996, p. 1643). Alongside the decline in Catholic practices in Quebec, there was a significant women's movement which focused on abortion during the 1970s and beyond.

It is my contention that this women's movement contributed greatly to the success of the Morgentaler legal cases and eventual decriminalization of abortion in Quebec. Thus, with the weakening of the Catholic Church's influence in Quebec, came an increased presence for women's interest groups, perhaps suggesting that once the constraints of a conservative religion are removed, women can strive for greater autonomy via interest group organizing. Indeed, the decline of Catholicism (alongside the simultaneous rise of a secular form of nationalism) afforded an important opportunity to the women's and pro-choice movements in Quebec to seize upon a changing demography and push for a more liberalized abortion policy. This provided space for the pro-choice movement to shift public discourse and, in the process, help secure legislative changes. This opportunity was not available to the pro-choice movement in Ireland, who still has to deal with a comparatively strong and influential Catholic church, as well as a host of staunchly Catholic interest groups, such as the PLAC who were opposed to the liberalization of abortion policy.

Quebec Pro-Life/Anti-Choice Interest Groups

In Quebec, as in Ireland, there has been, and continues to be, an active pro-life/anti-choice movement advocating against abortions and for the life of the fetus. What distinguishes the pro-life movement in Quebec from that of Ireland is that the Supreme Court has explicitly stated that there exists no fetal right to life and thus, the fetus is not a rights bearing entity (*R v.Morgentaler*, 1988; *Tremblay v. Daigle*, 1989). In contrast to Quebec, the Irish the pro-life movement was vindicated by the 1983 passing of S.40(3)(3)'s fetal right to life amendment which served to bolster their position that the fetus is worthy of rights protection. In the absence of a fetal right to life in Quebec, the pro-life movement often relies on appeals to emotion and personal sentiment, as there exists no legal protection for the life of the fetus for them to call upon directly. Whereas in Ireland fetal rights are explicitly provided for and protected in S. 40 (3)(3) of the Constitution, the Supreme Court of Canada, in Borowski, clearly ruled that no such right exists.

Consequently, this has required that Quebec's pro-life groups, both religious and secular, to frame their arguments in a much different way from their Irish counterparts. For example, prominent pro-life/anti-choice groups such as Campaign Life Coalition, Realistic, Equal, Active for Life (REAL Women) and various Right-to-Life Associations at the local level argue that although the federal government does not protect fetal rights, in their opinion, fetuses are in fact rights bearing individuals. As Mary Ellen Douglas of Campaign Life Coalition explains, the pro-life movement is largely a reaction against the pro-choice activism of Dr. Morgentaler and his supporters. Douglas argues that "there is

a movement out there promoting the killing of children in the womb" and that Morgentaler is nothing more than "a paid hit-man" (CBC, Laws and Mores, 2011).

When explaining the goals of the pro-life movement, Douglas (2011) argues that "struggling to change the hearts and minds of people is a longer battle" and although the pro-life movement may appear to have less supporters than their pro-choice counterparts, this will not hinder their activism. As Douglas' statement illustrates, the dominant "framing" (Meyer and Staggenborg, 1996, p. 1640) of the pro-life/anti-choice movement to appeal to emotions, often by relying on graphic photographs and personal stories.

As was outlined in chapter four, various attempts by the pro-life/anti-choice movement have been made since *Morgentaler* to re-criminalize abortion. These include, but are not limited to, Bills C-338, C-484, C-510, and M-312. What is most interesting about these attempts at recriminalizing abortion is that they are often initiated by national as well as provincially based individuals/individual MPs or small community based groups, rather than large national based or religious-based organizations. Thus, in Quebec, the pro-life movement does not possess the same level of organization as that of their pro-choice counterparts. This is not to suggest that there does not exist a pro-life movement, rather it occurs on a more local and individual level, instead of nationally. Contrasting pro-life organizations in Quebec with their counterparts in Ireland, Irish examples are far more organized both domestically as well as internationally.

It should be noted that pro-life groups are often reactionaries against the pro-choice movement therefore much of their organizing revolves around the activities of the pro-choice movement. For example, the pro-life movement became particularly active in Quebec and Ontario as a means of protesting Morgentaler's clinics.

Decline in Catholicism Compared

There are both similarities and differences in the decline of Catholicism as a result of both the Quiet Revolution in Quebec and the era of the Celtic Tiger in Ireland. In both instances, it seems that the following variables are similar: a young, increasingly liberal population, growing emphasis on individuality, and a questioning of the authority of the Church. What distinguishes the two, however, is the time period and overall environment in which these anti-religious transformations took place. Where we can already observe the outcome of a decline in Catholicism during the 1960s in Quebec, namely increased liberal values towards reproduction and marriage, in Ireland restrictions on reproduction still exist. Perhaps as the youth of the Celtic Tiger era grow into adulthood and begin to become more active in policy formation Ireland will also experience a revolution with regard to opinions on reproductive choice.

If we return to the question fuelling this chapter, are Catholic values the best variable to explain Ireland's restrictive stance towards reproduction, I believe that we can see that Catholic values, like nationalism, contribute to one part of the opportunity structures that facilitate and restrict access to abortion in the jurisdictions. Although Catholic conservatism is certainly not the only cause for Ireland's position on abortion, it contributes to Ireland's historical (and, to some degree, contemporary) rejection of legal abortion, the fact that the level of religiosity felt in Ireland is slowly declining suggests that Ireland is not presently as Catholic as it once was. This also suggests that perhaps as Catholic values decrease in Ireland, so too may the staunch opposition to legal abortion, particularly as it is expressed by members of the law-making community. It is also

necessary to point out the fact that abortion has not always been as strictly prohibited by the Catholic Church as it is today. In fact, it was not until the 1860s when abortion became a more common occurrence that the Catholic Church declared that abortion in all instances was a sin before the Church.

Finally, as the case of Quebec illustrates, a state containing a historically Catholic population can also be home to a successful reproductive rights movement. Historical Catholic beliefs do not necessarily prevent future generations from liberalizing their own positions on abortion. In fact, as the population of Quebec during the 1960s illustrates, it is possible for a generation to reject conservative Catholic values in favour of a more liberal approach to reproduction.

We are now left with the question: if neither Irish nationalism, nor Catholic values fully explain Ireland's continued restriction of reproductive rights, which variable is responsible for this position? Is there something uniquely Irish that accounts for its rejection of legalized abortion? Is Ireland perhaps missing a key ingredient required for a successful reproductive rights movement? If the state level, via nationalism and the Catholic Church are both unable to explain Ireland and Quebec's positions on abortion, perhaps the missing variable lies in the opinions and positions of citizens themselves.

Chapter 7: Interest Groups, Agents and Avenues for Change

> The dysfunctional way Irish policy makers have dealt with women's need for abortion in Ireland can give the impression that the abortion issue is somehow different in Ireland and perpetuates the myth that it is too sensitive, too controversial a topic for debate. This is not the case. Women and girls need access to safe abortion services in every country around the world and Ireland is no different…In the last decade there has been a significant shift in public attitudes towards abortion (Irish Family Planning Association, 2013).

As we have already looked for the roots of the divergent stances on abortion in nationalism and Catholicism, it appears that neither the state nor the Church alone can be held accountable for this position, and, in relation to Quebec's liberal policy on reproductive rights, these two variables do not explain Ireland's highly conservative regulation of reproductive rights. We must therefore consider the role of broader Irish society in accounting for this conservative regulation. Recalling the central theme of individual agency in relation to institutional opportunities, this chapter serves to consider the opportunities (not) afforded to individual and group agents in the battle over reproductive choice. In other words, which institutional avenues were available to pro-choice movements in Ireland and Quebec, both historically and at present?

In considering "society" we must take into account the positions of individuals, interest groups and society as a whole as it may express a collective opinion through polls and referenda. While the impact of pro-life interest groups was considered in the previous chapter, as well as the influence Catholic Church, in this chapter I focus on the experiences of pro-choice interest groups as well as any agents at play.

At a micro level, highlighting the experience of two Irish women using the names 'Aisling' and 'Claire' for privacy purposes, we are able to glimpse into the experience of what life is like in Ireland for a woman who chooses to terminate her pregnancy. In an

attempt to uncover how Ireland's abortion policies affect women living in Ireland, Maryanne Mollmann (2010) from Human Rights Watch decided to conduct interviews with Irish women who had recently obtained abortions while living in Ireland.

One of the interviewees was 'Aisling,' a 45 year old woman who lived in Ireland with her husband. When Mollmann met Aisling to interview her, Aisling made sure that they met in private and they had to keep their voices down in order to make sure that none of her colleagues heard the details of their discussion (2010, p.1). When Aisling found out that she had become pregnant, upon further consultation with her physician, she learned that her fetus had a genetic condition and that it would most likely not survive past birth. Aisling attempted to seek information about her options at local hospitals but they were of little assistance and refused to offer information about the possibility of abortion. Recounting the words of one particular consultant, Aisling explains that she was told to "Just let things happen naturally…You'll have a miscarriage anyway" (Mollmann, 2010, p.1).

After receiving very little useful information in Ireland, Aisling realized that if she was going to safely obtain an abortion she would have to travel to England for the procedure. What is most striking about Aisling's case is the ambivalence of the Irish government and medical professionals towards women's personal struggles with pregnancy loss and abortion. Not only could Aisling not receive an abortion for medical reasons, she was also restricted from accessing information on abortion services in Ireland and abroad. As Mollmann (2010) explains, in Ireland, clinics are often forbidden from sharing abortion related information over the phone or internet and in many cases they refuse to share any information at all (p. 2).

What is worse, those clinics that do provide abortion related information often deceive women. For example, 'Claire C.' was informed by an consultant from a clinic entitled 'British Alternatives' that "she would most certainly need a hysterectomy if she had an abortion and that she might also develop breast cancer, cervical cancer, and end up infertile" (Mollmann, 2010, p.2). As is exemplified by the cases of 'Aisling' and 'Claire C.' women's individual experiences of limited abortion information and access in Ireland illustrate the impact that the Irish government and Court's decisions have on everyday women. Asling and Claire C's stories also illustrate that there are indeed Irish women who are seeking abortion and who have been negatively affected by the state's refusal to provide for safe and legal abortions.

In Ireland, as previously noted, the focus of discussions surrounding abortion has primarily centred on the right to life of the unborn and only secondarily on the rights of women (as it also evidenced by s. 40 (3)(3). Even pro-choice literature in Ireland is often framed along somewhat moderate arguments advocating for women's right to travel abroad to receive abortions, often avoiding outright proclamations supporting a women's right to choose.

When **'**women as women**'** are the focus of abortion related legislation in Ireland, clearly the focus has only been on negative restrictions against women and not on an expansion of their positive rights. As is exemplified by each of the five referenda on abortion rights and access in Ireland, the concern of legislatures and courts is often focused on determining when negative restrictions can be imposed upon women's freedom (of travel and to education) in the name of protecting the unborn, thus neglecting to comment on women's positive rights to reproductive autonomy. As was

mentioned previously in chapter three, an Irish woman may only have access to a legal abortion in Ireland if her life is immediately at risk, potentially via suicide (*Attorney General v. X*, 1992).

To secure a positive right to abortion in Ireland, a woman must be deemed suicidal. This is not to suggest that there has not been a hardworking and active women's rights movement in Ireland, but rather, that the struggle for greater reproductive freedom in Ireland has been a unique journey, especially in relation to the journey of the Quebec pro-choice movement, and one which has been focused on generating sympathy for women who have abortions as well as finding ways to increase information about reproductive services for Irish women. Simply put, neither the same political opportunities, nor the political climate, have existed for the Irish women's movement, which has in turn resulted in a more unique journey and different policy outcomes.

Ireland's Pro-Choice Movement and the Women's Movement

It may seem as though the interest group representation in Ireland is dominated by pro-life interest groups. However, there are strong and innovative pro-choice organizations that are working to facilitate women's access to greater reproductive autonomy. Considering the meso-level of analysis, it is necessary to take into account the actions and position of interest groups in Ireland. When raising the question, is there an active pro-choice movement in Ireland, one only needs to look to the actions of Irish based groups such as the Irish Family Planning Association, Dublin Abortion Rights Group, Cork Women's Right to Choose Group, Youth For Choice, Women on the Waves and the National Women's Council of Ireland (NWIC) to find that yes, there is in fact a

pro-choice movement in Ireland, all of whom have taken innovative approaches to promoting reproductive rights in Ireland and internationally (Gomperts, 2002).

What is most unique about Ireland's pro-choice movement is its historical focus on what we might call direct support, rather than lobbying for political change. These organizations are often involved in projects to share information on reproductive services and educate women on their options with regard to contraceptives as well as abortion, rather than directly lobbying for abortion clinics in Ireland. Groups such as Youth for Choice (discussed in chapter 4) and Women on the Waves concentrated their efforts on producing educational pamphlets for women and, in the case of Women on the Waves, actually offering limited reproductive health services such as contraceptives through their agency. Only since approximately 2013 have groups, such as the Coalition to Repeal the 8th and the Irish Feminist Network (IFN), begun to call for the repeal of the 8th amendment in Ireland (irishfeministnetwork.org).

Before outlining the actions of the interest group Women on the Waves in further detail, we must offer a brief outline of some of the most relevant dates in Irish history with regard to contraceptive law. Under the *Health (Family Planning) Act of 1979* contraceptives were legalized in Ireland, although strict regulations were put in place to outline who may purchase or be prescribed contraceptives (Irish Family Planning Association, 2012). For example, to legally purchase condoms, a prescription from a medical doctor was required. If you were found to have illegally purchased condoms the punishment was six months in prison or a $450 fine (Donaghy, 2012).

By March 1985, the *Health (Family Planning) Act* was amended to allow persons aged 18 years and older to purchase condoms and spermicides without a prescription. In

1988 the age required to purchase condoms was lowered to 17 years. More recently, in 2011, the emergency contraceptive pill was introduced to pharmacies in Ireland (Irish Family Planning Association, 2012). The shift in availability of contraceptives in Ireland seems to illustrate a move in recent years away from staunch Catholic teachings which ban contraception outright, and also represents some degree of liberalization in Ireland's reproductive rights regime, though certainly this does not touch the issue of abortion. Perhaps this is also indicative of a larger shift in Irish opinions on reproduction more generally speaking.

Women on the Waves was founded by Dr. Rebecca Gomperts, a physician who strongly believes that women should have autonomy over their bodies at all times. Women on the Waves is a pro-choice group based out of the Netherlands whose objective is to draw attention to the fact that nearly 6,500 Irish women travel to Britain each year for abortions, as well as to provide reproductive health services on a ship which travels at least 12 miles off the shore of a given land-mass (in this case Ireland), thus operating in international waters and therefore outside of Ireland's jurisdiction (Gomperts, 2002).

Women on the Waves began its journey towards promoting reproductive rights in Ireland at the request of two Irish based, pro-life groups: Dublin Abortion Rights Group and Cork Women's Right to Choose (Gomperts, 2002). In June 2001, as its pilot project, Women on the Waves set sail from the Netherlands towards Ireland in a ship with 100 Irish volunteers. The goal of Women on the Waves was to educate Irish women about their options with regard to birth control and the abortion pill (which can be administered up to 45 days into a pregnancy) (Gomperts, 2002). Due to complications and delays surrounding Irish and Dutch passenger licences, Women on the Waves was unable to

dispense abortion pills (which can be taken up to 63 days post- unprotected intercourse to end a pregnancy by causing miscarriage like symptoms resulting in the expulsion of the embryo from a woman's body) on the ship (Planned Parenthood, 2015).

Women on the Waves was, however, able to offer educational and consultation services, ultrasounds, pregnancy tests and to dispense contraceptives as well as the morning after pill (which can be taken up to 72 hours after unprotected intercourse to prevent the implantation of a fertilized embryo to Irish women seeking information on abortion related issues (Planned Parenthood, 2015). As Rebecca Gromperts (2002), the founding director of Women on the Waves explains, "After five days, 300 women had contacted the ship's hotline…[and shortly after] women began visiting the ship" (p. 181). Following their pilot journey to Ireland in 2001, Women on the Waves has since applied for a second licence to operate the ship from the Dutch Ministry of Health, to depart from the Netherlands and has been denied. Most recently, Women on the Waves have hosted reproductive health clinics in the water outside Portugal (2004), Spain (2008) and Morocco (2012) (womenonthewaves.org).

Since 2001, Women on the Waves has continued to operate, providing information to women as well as shifting their focus toward providing medically induced chemical abortions (an abortion brought on by ingesting RU 486 within the first twelve weeks of pregnancy) (womenonthewaves.org). Gomperts advises that women living in countries where legal abortion is available through a physician's office should pursue this avenue. However, where this is not an option, RU 486 can provide a safe alternative. Once a pregnant woman has taken RU 486 "her uterus will begin contracting, expelling the pregnancy" (womenonthewaves.org). What is most significant here is that once the

pregnancy has been terminated using RU 486 there is no way for medical or legal officials to prove if a natural miscarriage took place, or even if RU 486 was taken. Thus, for women living in countries where abortion is illegal, this presents a highly desirable option compared with unsafe "back room" abortions.

It is interesting to note that in many instances, rather than challenge Irish law directly, Irish feminists have opted to look outside Ireland itself for solutions. For example, in May of 1971, 47 Irish women gathered at Connolly Station in Dublin with the common goal of travelling to Belfast, Northern Ireland to where it was legal to buy contraceptives, such as condoms (Have you Heard, 2013). When the women who rode the 'Condom Train' to Belfast returned to Ireland,

> The customs men were so mortified by their transgression that they quickly admitted that they couldn't arrest them all, and let them go without challenge. The women walked through the station victoriously waving the contraband around, with some blowing up condoms like balloons (Have you Heard, 2013).

The existence of the condom train, as well as more recent groups such as Women on the Waves, clearly illustrates that the Irish women's movement has pursued solutions abroad, rather than directly attack the Irish state itself, and that these solutions have sought to advance reproductive rights and autonomy without necessarily challenging the restrictions on abortion or the institutions which uphold and enforce them. With Ireland's close geographical proximity to states such as Northern Ireland and Britain, which have more liberal laws with regard to contraception and abortion, this seems to have been a strategic action by Irish feminists.

The Irish Family Planning Association (IFPA) was founded in 1969 to challenge Ireland's ban on contraceptives and remains active today in promoting reproductive

freedom and education for men and women in Ireland. One particular example of the organization's work is its agenda to expose rogue crisis pregnancy agencies (RCPA) whose goal is actually to prevent women from obtaining abortions. RCPAs pose as family planning clinics and claim to offer women information on reproductive services when, in reality, they are actually pro-life organizations whose primary function is to persuade women to carry all pregnancies to term.

In 2006, the IFPA published a fact sheet outlining ways to spot a RCPA as well as exposing the ways in which RCPAs mislead pregnant women. For example, they reported that RCPAs delay pregnancy results so that they can attempt to persuade women to forgo abortion. As the report of the IFPA explains, "Women describe being harassed, bullied and given blatantly false information…they claim to provide family planning services and abortion information [when in fact their purpose is to prevent abortions]" (Irish Family Planning Association, 2012). RCPAs go so far as to tell women that abortions are life-threatening procedures which can place them at a higher risk for developing breast cancer and infertility, all of which are claims that have been refuted by the Royal College of Gynaecologists and Obstetricians (Irish Family Planning Association, 2012). This exposure of RCPAs is only one example of the type of information the IFPA shares with Irish women through its online forum.

The IFPA also offers a number of pregnancy and reproduction related services for women as well as men such as: contraceptive advice, a vasectomy clinic, free cervical smear testing, STI screening and treatment, free pregnancy counselling, free post-abortion check- up, fertility advice, pregnancy testing, menopause advice and emergency contraception (Irish Family Planning Association, 2012). What is most interesting about

the list of services offered by the IFPA is that each of their initiatives aims to work within existing Irish law, rather than change the law itself, highlighting the limited opportunities for institutional change within Ireland, but also highlighting the innovative nature of the Irish pro-choice movement, which is required to work within these existing confines. These organizations have thus created an opportunity to work within the system to facilitate change, albeit on a very limited scale.

The National Irish Women's Council, founded in 1973, began with the mandate of gaining equality for women (National Women's Council of Ireland). In 1989, the NWIC produced a Charter for Women's Rights and in 1990 took part in the second Commission for the Status of Women. NWIC acts as an umbrella group for various other women's interest groups, all of which emphasize the need for gender equality in Ireland. Although NWIC does not focus primarily on abortion, it does provide a forum for discussions of gender equality, which ultimately impacts abortion and reproductive rights policies.

As the above outline of the most prominent pro-choice groups in Ireland illustrates, the primary function of these groups has been and continues to be to educate women and to allow for access, and push for more liberalized access, to reproductive services abroad and contraceptives in Ireland. What is most striking about these groups is the absence of a group whose sole function is the promotion of the legalization of abortion in Ireland. With the exception of the self-titled campaign entitled "Make it Safe and Make it Legal," which was launched alongside *A, B and C v. Ireland* with the mandate of pressuring the Irish government to remove restrictions on abortion, there are no groups who focus primarily on the legalization of abortion ("Safe and Legal in

Ireland", 2012). The limitations faced by "Make it Safe and Make it Legal" are that their campaign is quite small and lacks the infrastructure of some of the larger women's groups.

At present in Ireland there exists a grassroots, social media based movement whose goal is to encourage politicians to consider repealing the 8th amendment. Groups such as the Irish Feminist Network and Coalition to Repeal the 8th hold regular meetings, online discussions and demonstrations calling for the repeal of the 8th amendment during the next election in 2015 (twitter.com/repealtheeighth). Although the very existence and growing strength of the Irish women's movement illustrates a shift from previous decades, without sufficient institutional and "elite" support, the battle for safe, legal abortions has proven tremendously difficult for Irish women's groups.

Quebec Pro-choice Interest Groups

Comparatively, in Quebec, the sole function of pro-choice groups has been to first lobby the government to de-criminalize abortion and then to create a state where abortion was made safe and available to all women, though other women's groups offer direct support and reproductive advice to women. Women's interest groups played an incredibly significant role in the Quiet Revolution in Quebec, as well as in the abortion rights movement. In particular the Federation des femmes du Quebec (FFQ) and the Centre des femmes played a significant role in Quebec specifically, while the Canadian Abortion Rights Action League (CARAL), the Pro-choice Action Network/ Reseau d'action pro-choix (PCAN) and the Coalition québecoise pour le droit a l'avortement

libre et gratuit (CDAC) at the national level and Ontario Coalition for Abortion Clinics (OCAC) advocated for abortion rights in Quebec (and elsewhere in Canada).

Former FFQ president Ghislaine Patry-Buisson (2005) explains that the FFQ took a formal pro-choice position in 1976 after an education campaign funded by its members highlighting the need for safe and legal abortion. The demands of the FFQ were that s.251 of the *Criminal Code* be challenged in Court and that TACs be developed in Quebec. The FFQ was most active in promoting education for women, both those who wanted abortions and those who wished to carry their pregnancies to term.

The Quebec-based Centres des femmes was created out of the collapse of the former feminist nationalist group Front de libersation des femmes (FLF), which dissolved in the early 1970s. The Centres des femmes began as a women's interest group following the goals of the FLF, which included women's liberation through a Quebec nationalist project. In 1973, however, when Morgentaler's legal struggles came to the forefront of the women's movement in Quebec, they announced that free and legal abortion would become their primary focus (Mills, 2011). More specifically, the Centre's mandate was that:

> The legalization of abortion (free and on demand) is not an end in itself; it is, however, an essential service owed to us by a society which does not even ensure the minimum material conditions which would allow us to raise children (free day-care, paid maternity leave, collectivization of housework etc.). For women, birth control through contraception and abortion (if the contraception didn't work) is crucial. It's the first step towards the possibility of controlling our own lives (Mills, 2011, p. 346).

The Centres des femmes' mandate illustrates just how different the goals of interest groups were in Quebec as compared with Ireland. Here, women and their ability to make

choices regarding their bodies are at the centre of debate over reproduction. Instead of simply calling for abortion to be legalized, they are also demanding that it be a service provided for all women, on demand and free of charge. Further, that someone such as Morgentaler was willing to openly challenge the restrictions on abortion encouraged the Quebec pro-choice movement to change its strategy accordingly.

CARAL was founded in 1973, the same year that abortion in the first trimester was made legal in the United States as a result of *Roe v. Wade* (Rebick, 2005). During the 1970s, many women's groups, and particularly CARAL, raised funds for Morgentaler's legal actions, lobbied provincial governments to improve access to abortions and pressured hospitals to increase the number of active TACs. The primary function of CARAL was to foster change in federal abortion law (Weir, 1994).

Pressure from feminist groups led to the creation of the Report of the Committee on the Operation of Abortion Law, also known as the Badgley Report. The result of the Badgley Report was a direct statement to the Federal Attorney General which asserted that: "The procedure provided in the *Criminal Code* for obtaining therapeutic abortion is illusory for many Canadian women" (Rebick, 2005, p. 157). In fact, only one in five Canadian hospitals had set up TACs by 1977. It was the process of having to appeal to a TAC to obtain an abortion which would form the centre of Dr. Morgentaler's clinic movement during the 1970s and 1980s in Quebec. That such a committee was established in the first place, despite its barriers, highlights the institutional access available to pro-choice advocates in Quebec that was not available in Ireland.

The Badgley Report also stated that in many cases the wait time for women between their first physician's appointment and obtaining an abortion was quite high. It

was, on average, eight weeks (Weir, 1994). Clearly the sensitive time constraints of pregnancy and abortion make this wait problematic. Furthermore, the report indicated that in some provinces abortion was not available at all, thus causing many Canadian women to travel to the United States for an abortion (as evidenced in *Tremblay v. Daigle*) (Weir, 1994).

In addition to offering assistance in the formation of the Badgley Report, CARAL's greatest impact on the reproductive rights movement was its fundraising efforts in support of Morgentaler's legal battles. As former CARAL president Norma Scarborough (2005) explains, "We raised [funds for Morgentaler] almost entirely through direct mail to our membership" (p. 163). Scarborough explains that CARAL was not yet experienced enough as an interest group to provide the hands on support to Morgentaler that other groups such as OCAC in Ontario were, but they did feel that they had the capacity to educate people. Scarborough also comments that another women's group, the National Action Committee on the Status of Women, or NAC, wasn't paying enough attention to the abortion issue (2005).

By the 1990s CARAL had grown considerably in numbers and influence. As Lorna Weir (1994) outlines,

> In early 1990, at the height of the struggle to keep abortion from being recriminalized, CARAL had thirty-five chapters, with a minimum of one in every province and territory, 300 member groups, and 18,000 individual members. Member groups were overwhelmingly from feminist organizations, although they included health services, religious groups, women's committees of the New Democratic Party (social democrats), and a very few unions (p. 256).

The second prominent national pro-choice women's group was the Prochoice Action Network or PCAN, which was a subsidiary of CARAL. While CARAL focused

on changing abortion law, at the federal level, PCAN was most active at the local level, offering support to abortion clinics (Weir, 1994). PCAN also worked actively at linking pro-choice centres from across the country such as: the British Columbia Association for Abortion Clinics, the Calgary Pro-choice Coalition, the Coalition québecoise pour le droit a l'avortement libre et gratuité (CDAC), the Halifax Pro-choice Action Group, the Ontario Coalition for Abortion Clinics, the Ottawa Pro-choice Network, and the Manitoba Coalition for Reproductive Choice (Weir, 1994).

Another group which has been particularly active in the pro-choice movement in Canada and Quebec was the CDAC and its English-speaking cousin, the Abortion Rights Coalition of Canada (ARCC), which were founded in 2005. Although their activism began in the post-Morgentaler era, once abortion was de-criminalized, CDAC illustrates that the struggle for greater access to abortions is an ongoing pursuit. Their mandate continues to be "to undertake political and educational actions on the issue of rights and reproductive health issues" (ARCC, 2015).

Along with nationally based reproductive rights groups, the Ontario Coalition for Abortion Clinics (OCAC) played a significant role in supporting the work of Dr. Morgentaler. According to the OCAC's mission statement, "The Ontario Coalition for Abortion Clinics (OCAC) was started in 1982 by women health care workers from the Immigrant Women's Health Centre, Hassle Free Clinic, and the Birth Control and VD Information Centre in Toronto" (OCAC, 2012). The OCAC sought to create private abortion clinics which would be accessible to all women. It was the OCAC who requested that Dr. Morgentaler, Dr. Leslie Frank Smoling and Dr. Robert Scott open their first Ontario abortion clinic in Toronto in 1982.

The opening of the Toronto Morgentaler Clinic signified the first attempt to make a national change within Canadian law, an act which would not have been possible without the OCAC. As the Quebec Minister of Justice, Marc-André Bedard, had clearly stated that he would no longer prosecute Morgentaler in light of his several instances of jury acquittals, if Morgentaler was to bring the abortion issue before the Supreme Court once again, he would need to bring charges against himself elsewhere in Canada. Thus when Morgentaler was approached by the OCAC and asked to open an abortion clinic in Toronto, he obliged as this was his opportunity to bring attention to Canada's criminalization of abortion once again. As was mentioned in Chapter three, the reason for the OCAC's alignment with Dr. Morgentaler is symptomatic time sensitive nature of pregnancy; it would have been nearly impossible for a pregnant woman, seeking an abortion, to bring her case before the Supreme Court.

The OCAC is still active and at present it focuses its efforts on increasing education on reproductive rights as well as lobbying for greater access to abortion services for all women (OCAC, 'About,' 2012).

In summary, as Lorna Weir (1994) explains:

> Prochoice mobilization challenged a regulatory system based on the criminal law of the federal state, and since the failure of the government's attempt to recriminalize it, activity has moved to access questions regulated under provincial healthcare policy. The abortion campaign reflected the progress of cases through the courts, with particularly large popular mobilization occur- ring at the time of verdicts. The civil disobedience campaign necessitated ongoing fundraising in order to pay legal fees (p.270).

In Quebec, women's interest groups were active in the reproductive rights movement by fundraising to pay for Morgentaler's many legal battles, by raising awareness about safe

abortion practices available to women and also by rallying together and influencing politicians and as the abortion caravan illustrated, impacting parliament itself.

The questions remain: Why did Irish feminists focus primarily on securing abortion access abroad for Irish women, whereas activists in Quebec focused on their provincial and state institutions? What was it about the Irish case that ultimately deterred feminists from lobbying the state directly for change?

Irish Women's Movement and Reproduction

To contextualize the discussion of abortion in Ireland, we must note that abortion has never been a central component of the mainstream women's movement in Ireland, and in reality many women's groups have historically been reluctant to take a pro-choice stance at all. As Evelyn Mahon (2001) explains, "Abortion has been a marginal rather than a central feature of the women's movement [in Ireland]. And, rather than directly advocating abortion reform legislation, the movement's role has been to generate empathy and understanding for women who have abortions" (p. 157). Mahon outlines the women's movement in Ireland as it pertains to abortion as a series of the debates, the first over the 1983 Constitutional Amendment to Protect the Unborn, the second discusses the *X* case and *Maastricht Treaty* and the third considers the *C* Case and the Green Paper.

This reluctance to take a strong pro-choice position is a result of many factors such as the struggles the women's movement faced to have their voices heard at all in Ireland, a highly anti-choice public within Ireland, conservative institutions that have not been open to change, and a lack of a sense of urgency for women to have the right to choose abortion in Ireland because the service is available in the U.K. In light of the

above mentioned factors, political opportunities that could have mounted a series challenge to Ireland's anti-abortion laws were not open to the segment of the women's movement that prioritized this demand. Instead, the women's movement utilized the opportunities available to it to gain access to more moderate reforms, such as access information about abortion and the ability to travel abroad to obtain an abortion. Once s. 40 (3)(3) was passed into law, Ireland begun its journey down a path of protection for the life of the unborn, which consequently lead to the restriction of reproductive freedom for women. Here, the theory of path dependency outlined by Pierson (2000) and Hacker (2005) quite accurately depicts Ireland's abortion history. Once Ireland constitutionally entrenched a fetal right to life, any attempts to alter this path would prove incredibly difficult.

On the other hand, as was noted above, interest groups such as Women on the Waves, as well as the women who spearheaded the 'Condom Train' have been innovative in pursuing other methods of promoting reproductive choice in Ireland, by largely focusing on awareness and information sharing. Although Women on the Waves offers its services to Irish women, it is in fact an interest group which is based out of the Netherlands. While abortion remains illegal in most instances in Ireland, women's interest groups have been effective at providing women with contraceptives and information about abortion services available to them in the U.K. Thus, the Irish women's movement has, drawing on historical feminist successes, chose to work within the confines of Irish law in instances where formal legal change have not yet been possible.

This is not to suggest that there has not been any institutional push for political change, though it certainly has not been the primary strategy employed by the Irish pro-choice movement. As has been previously outlined in chapter three, the PLAC sought to, and was successful in creating an amendment (s.40 (3) (3)) to the Irish constitution which would protect the right to life of the unborn. The dominant women's group at this time was the Women's Right to Choose Campaign (WRGC), who feared that a clear pro-choice position would hinder public support for their position (which rejected the campaign for a fetal right to life) and so instead they opted to align themselves with the moderate Anti-Amendment Campaign (AAC) (Mahon, 2001).

The AAC took the stance that the amendment should not be passed because: "1) it would do nothing to solve the problem of unwanted pregnancies, 2) it would allow for no exceptions, 3) it was sectarian, 4) it would prevent possible legislation on abortion and 5) it was a waste of public funds" (Mahon, 2001, p.162). This relatively neutral approach was a conscious and strategic choice to attempt to gain a broader base of support. They sought to appeal to the groups of women who were in general opposed to abortion, but who also believed that a formal amendment was too much of an encroachment on a moral issue by a legal body. Rather than reject the premise of a right to life of a fetus outright, the AAC instead poked holes in the amendment campaign, while not taking an obvious pro-choice position.

Much like of the rest of the Irish abortion movement, the focus of the Anti-Amendment Campaign was not on women's rights or autonomy but rather it was on preventing unwanted pregnancies in general (thus, the focus was not on allowing women to choose how to handle an unwanted pregnancy, but rather to prevent these type of

pregnancies all together). In fact, the only mention of women was to point out that the amendment could put women's lives at risk by protecting fetal rights without exception. For Mahon (2001), the AAC's gender-free, neutral approach to combating the right to life of the unborn amendment constitutes co-optation because they moved away from an explicitly pro-feminist viewpoint and was therefore largely unsuccessful (p. 163). While women were active participants in both sides of the debate over the amendment, women's interests themselves remained outside of the debate entirely. During the 1980s, only Irishwomen United took a strong pro-choice position, however at the time of the 1983 amendment campaign Irishwomen United remained relatively quiet as a pro-legalization position lacked public support.

The second debate considered here discusses the Irish women's movement's responses to the case of *X* and the *Maastricht Treaty*, emphasizing the right to travel and to information. The focus of the women's movement during the *X case* was framed "not in terms of a woman's freedom to choose, but in terms of raising the status of woman's life to equality with the life of the unborn" (Mahon, 2001, p. 166). Section 40 (3)(3)'s rigid protection of the right to life of the unborn ultimately placed the fetus in a stronger position with regard to rights than the woman carrying the fetus. Therefore, in this stage of the women's movement, it was the goal of women's interest groups to argue for the ability to procure an abortion where a woman's life would be at risk as a result of the pregnancy.

The court's decision in *X* was, not surprisingly, a divisive issue. While their ruling permitting abortion in a limited number of circumstances (a vague allowance in cases in which a woman's life was at risk) was conservative in comparison with the vast majority

of western, liberal-democratic nations, it was relatively liberal in a country which has long had a highly conservative stance on any liberalization of abortion. This ruling was liberal enough to please Ireland's socially progressive voters and many inside the women's movement, but was too liberal for much of Ireland, who would have preferred a restriction on access to abortion in all instances. These implications of this decision became apparent in 1992 during a referendum surrounding Ireland's further integration with the European Union.

The referendum on the 11th amendment to the Irish constitution gave voters the ability to permit the state to ratify the *Maastricht Treaty*, which created the euro and established the three pillars of the European Union: the European Community (EC) pillar, the Common Foreign and Security Policy (CFSP) pillar, and the Justice and Home Affairs (JHA) pillar. More importantly, it set out the four freedoms for EU citizens, including, 1) the free movement of goods, 2) freedom of movement for workers, 3) right of establishment and freedom to provide services and 4) free movement of capital (European Policy Centre, 2014). The right to travel between member states was the most important to the reproductive rights movement in Ireland.

For Ireland, the Treaty included Protocol 17, which was "surreptitiously inserted" by the Minister for Foreign Affairs Gerry Collins in the aftermath of the *X* case and under pressure from pro-life groups (Mahon, 2001, p.167). Protocol 17 was added to the *Maastricht Treaty* after Ireland first rejected it outright, it asserted that: "nothing in the Treaty…shall affect the application in Ireland of Article 40.3.3 [the anti-abortion amendment] of the Constitution of Ireland" (Treaty of Maastricht, Protocol 17, 1992). This Protocol was problematic for both sides, and complicated Ireland's ratification of

Maastricht. Ultimately, however, it thrust the Irish women's movement (most notably the National Council for the Status of Women (NCSW) and its president, Frances Fitzgerald) into the spotlight.

As Mahon (2001) rightly notes of the process, "what has been a fairly straightforward referendum on a popular step towards greater integration with Europe and the formation of the European Union threatened to become a referendum on the X case, abortion, and women's rights to travel" (p. 168). There was little doubt that *Maastricht* had an entirely new meaning and set of implications. If the referendum was passed and *Maastricht* approved, the inclusion of Protocol 17 would have meant that Irish women were unable to assert their European Community right to travel to another member state to obtain an abortion. Similarly, they would not have been able to receive information about reproductive services available elsewhere in the EU (Reid, 1992). Despite the overtly conservative implication of this, the Protocol had little support from both the pro-choice and pro-life movements, and the passage of the referendum was far from guaranteed.

While the women's movement and other pro-choice advocates were rightly concerned that the passage of *Maastricht* with the Protocol would severely limit women's right to travel and obtain information, pro-life advocates worried that it would have protected the 'pro-abortion' ruling of the Supreme Court in *X* and immediately demanded another referendum to include an even more restrictive approach to reproductive rights (Mahon, 2001, p. 166).

In short, the *Treaty* had few supporters, and desperate for its passage, the government was put between a rock and a hard place. Recognizing the unpopularity of

Protocol 17 from both sides of the debate, the government tried, both pragmatically and unsuccessfully, to renegotiate the protocol. Although unable to do this, it was able to achieve the inclusion of the 'Solemn Declaration,' which permitted women to travel and obtain information of services legally available in other member states. It included an ability to amend the Protocol in the future, should a subsequent amendment of s. 40.3.3 occur. This was, according to Mahon (2001), "designed to please both sides, women who did not want to vote away their rights under the European Union (EU) legislation and [conservative groups] which hoped to have a referendum that would revert matters to how they were understood prior to the Supreme Court decisions" (p. 168). Despite this, support for the passage of *Maastricht* was by no means guaranteed, and it is at this point when the women's movement strategically stepped to the forefront.

Sensing an opportunity to advocate a middle ground which would permit the passage of *Maastricht*, while at the same time advancing reproductive rights in Ireland, the NCSW was able to insert itself into the debate and help to bring issues of gender into the forefront of *Maastricht*. This was an important strategic focus for the Irish women's movement to advance some liberalization of reproductive rights without championing access to abortion, and was reflective of the necessary rhetoric and tactics in light of the limited opportunities in Ireland's conservative political climate (Meyer, 2004, p. 139).

Interestingly, throughout the entire process, the NCSW refrained from positively endorsing a woman's right to abortion, and instead veiled their argument in terms of a link between mothers and the nation, the same sort of framing as discussed in chapter three. Fitzgerald, who became a key figure in the debate, criticized conservative groups not for interfering with a woman's right to choose, but rather, questioned their motives in

presuming to tell Irish women about their responsibilities as mothers (Mahon, 2001, p. 169). The NCSW did, however, advocate for some form of autonomy for Irish women by arguing that they should be able to make up their own minds on the issue.

Under the terms originally proposed by the government, the NCSW claimed that it could not recommend that women support the constitutional referendum on *Maastricht* unless they (on behalf of women) could be formally included on discussions relating to the EU. The government, as previously mentioned, needed the referendum to pass, and could not guarantee that it would, and by no means could rely upon the support of Irish women. As a result, Fitzgerald and the NCSW's desire to gender the debate on *Maastricht* and their influence on Irish women provided an important strategic opportunity to advance the rights of Irish women, and they pragmatically and effectively used the institutional opportunity provided by Maastricht to advance some degree of liberalization of abortion policy.

In fact, the government was reliant upon the NCSW to ensure the referendum's passage, and had to compromise with the organization in order to secure its support. Such action was necessary on the part of the government to "gain the necessary portion of the women's vote to pass the *Maastricht Treaty*" and illustrates the influence of the NCSW on the political process in Ireland (Mahon, 2001, p. 170). Thus, when they – and other pro-choice advocates - began to discuss the implications of Protocol 17 on women's right to travel, the government was forced to listen.

In exchange for support for the referendum on the 11th Amendment, the NCSW wanted a subsequent referendum that would give women both an explicit right to travel elsewhere in the EU to obtain an abortion and a right to obtain information on abortion.

Under the immense pressure of the Irish women's movement, the government agreed to hold two referenda in late 1992, one on the ability to travel, and the other on the right to obtain information regarding abortion. With the guarantee of the two referenda in place to provide an opportunity for women to have some autonomy over their reproductive freedom, "the Council encouraged women to vote in favour of *Maastricht*" (Mahon, 2001, p. 169).[11] This situation serves as an important example of "skilled organizers fram[ing] their demands to mobilize others" in light of the limited window to liberalize reproductive rights to some degree (Meyer, 2004, p. 129).

The electorate approved the 11th Amendment to the Constitution in June, 1992, paving the way for greater integration within the European Community (Reid, 1992). In November of that same year, three referenda questions were put to voters, one which sought to exclude suicide as grounds for a legal abortion (the 12th Amendment), and the two aforementioned referenda promised to the NCSW in exchange for supporting *Maastricht* (the 13th and 14th Amendments). The 12th Amendment failed, thus continuing to allow the threat of suicide as grounds for a legal abortion, while the 13th Amendment (freedom of travel) and the 14th Amendment (right to obtain information) passed. Over 65% of voters rejected the 12th Amendment, while the 13th and 14th passed with 62.39% and 59.88% of the respective votes. Overall, Irish voters were in favour of a woman's right to travel and to obtain information regarding abortions and, many people believed that the threat of suicide should be included as grounds for an abortion. In other words, it

[11] At the time of these two aforementioned referenda, a third referenda question on the 12th amendment was also posed. This question was "Should the threat of suicide as grounds for abortion (which came as a result of the X case) be removed." The third referenda question was rejected, maintaining that the threat of suicide was indeed grounds for abortion (Mahon, 2001).

appears that Irish public opinion has been gradually shifting away from a staunchly conservative position on abortion.

The decision to put women's freedom to travel and their right to obtain information regarding abortions to a referendum was at least partially the result of the strategic role played by the NCSW in the lead-up to the referendum on *Maastricht*. As Mahon (2001) notes, the Irish women's movements "gendered the debate and were accepted as legitimate participants in the policy debate leading to the referendums on abortion and travel" (p. 170). In so doing, they "gained a constitutional right to travel to procure an abortion and to information on abortion services," as well as helped to defeat an effort to reduce the significance of women's right to life and health in the aftermath of the *X* case (Mahon, 2001, p. 170). While important to the advancement of women's rights, Mahon (2001) nevertheless notes that the goals of the NCSW throughout this process were "moderate demands," which she claims helped to secure the state's support (p. 170).

The third debate considered here concerns the case of *C* and the subsequent Green Paper on Abortion. Recall briefly that the *C* case involved a young girl, under the guardianship of the Eastern Health Board, who had become pregnant as a result of rape and sought an abortion in England. Hers parents were attempting to prevent her from travelling to obtain an abortion. The Irish Government was asked to clarify under which circumstances it was permissible for a woman, under state guardianship, to obtain a legal abortion. Although the referenda in 1992 clearly stated that a woman has both the right to travel freely as well as free access to information, the case of a woman under the care of the state seeking an abortion had not been clarified (Mahon, 2001, 172).

Opinions were shared from both the pro-choice and pro-life caucuses with some arguing that the state had no place intervening in this case while others, such as the Archbishop of Dublin, believed that "the rights of the unborn child in Ireland are now very vulnerable" (Mahon, 2001, p. 173). Reflecting the general divisions within society, the position of the Irish women's movement was once again surprisingly neutral. As Mahon (2001) explains, "The National Women's Council of Ireland (NWIC), did not have a unified position on abortion policy, and focused instead on the unequal access of Irish women to abortion abroad" (p. 173). Once again, the women's movement was removing the gendered aspects of abortion from their position and instead framing the campaign on a gender neutral right to travel.

As a result of the *C* case, the Irish Government asked interested parties to submit recommendations to clarify the conditions under which abortion should be permissible in Ireland. A similar exercise had been undertaken twice previously. For a third time, recommendations were drawn up, and this time, a list of seven options, eventually reduced to three, was created, which led to a referendum on what would have been the 25th amendment to the Constitution. This proposed amendment would have removed the threat of suicide as a legal ground for abortion. As the proposed 25th amendment failed, the threat of suicide remained a legal ground for abortion in Ireland. For Mahon (2001), what is most significant about the *C* case for the Irish women's movement is the fact that "the third debate [over the C case and Green Paper] has again produced co-optation as the Irish women's movement activists continue to struggle with the highly divisive issue" (p. 176). It would seem that in Ireland women's groups themselves do not share a unified

position on the topic of abortion and as a result their activism is often quite passive in light of the political environment in which they operate.

In light of the preceding discussion one might ask, what have Irish feminists done to help or hinder the reproductive rights movement in Ireland? Considering the above mentioned cases, it is clear that women as a whole are divided in Ireland, much like Irish society broadly speaking. The fact that debates over abortion law are often approached in gender neutral terms suggests that the women's movement is not yet in a position of authority or security which would allow it to take a strong pro reproductive-choice stance. When discussing abortion, the position of the women's movement often emphasises a woman's right to travel or to information to the neglect of a consideration of the role of women's autonomy or choice.

As previously mentioned, in Quebec, with the absence of a fetal right to life, the central emphasis of the debate over reproduction was on women's reproductive autonomy. On the other hand, s.40 (3)(3)'s protection of fetal life created a legal barrier for women's interest groups as they were forced to work within the confines of a system which outright protected fetal life, to the extent that it restricted women's rights. In other words, while in Quebec women's groups were able to focus their efforts on securing a woman's right to choose, in Ireland, interest groups had to grapple with the fetal right to life which held a central place in discussions of reproduction.

In Ireland, the Archbishop of Dublin cautioned that the rights of the unborn were being threatened by cases such as *C* and the subsequent Green Paper. In Quebec, the court effectively rejected the s.7 right to life arguments on behalf of the fetus made by some interveners more than 25 years ago. Thus, the very framing of the debate over

reproductive rights, as well as the position of women's rights groups, appears quite different when comparing Quebec and Ireland. This difference in the way the abortion debate is approached in terms of framing, and each case raises the question of why are women's rights the focus of the debate over abortion in Quebec while they are outright neglected in Ireland.

A final embodiment of Irish positions on abortion is illustrated by public opinion polls themselves, all of which indicate that the Irish people are increasingly supportive of abortion in some circumstances.

Irish Public Opinion on Abortion

If we trace public opinion in Ireland over the past decades, it becomes apparent that, in general, society is taking a more liberal stance on the abortion question. In 1997, the *Irish Times* released a public opinion poll indicating that 77 percent of Irish people felt that abortion should be permitted in specific circumstances (Kennedy, 1997). Of this 77 percent, 35 percent believed that abortion should be allowed if a woman's life were threatened, 14 percent where her health was at risk as a result of the pregnancy with 28 percent in support of abortion in any case that it was needed (Kennedy, 1997). Ten years later in 2007, a public opinion poll found in the *Irish Examiner* indicated that 43 percent of Irish people were in favour of abortion if a woman deemed it to be in her best interest while 51 percent were opposed to abortion under these circumstances (O'Sullivan, 2007). Where a woman's life was in danger 82 percent of people supported abortion and 73 percent were in favour of legal abortion in cases of sexual abuse (O'Sullivan, 2007).

Most recently in February 2013, an *Irish Times* poll of 1,000 voters suggests that 84 percent of people believe that abortion should be permitted where a woman's life is at risk as a result of pregnancy (Collins, 2013). This poll also explained that 78 percent of people believe that abortion should be allowed in cases of sexual abuse. With regard to women's health, 71 percent of people felt that abortion should be allowed in instances where the pregnancy causes thoughts of suicide with 70 percent in support of abortion where a woman's general health is at risk. Finally, 37 percent of people polled indicated that women should be allowed to receive an abortion when she deemed it to be in her best interest (Collins, 2013). According to this poll, as of 2013 only 13 percent of people surveyed believe that abortion should not be allowed in any circumstance (Collins, 2013). As the above figures indicate, Irish public opinion is not in favour of abortion in all instances but rather primarily where a woman's health is threatened. In other words, Irish people opinion is becoming increasingly supportive of abortions in some instances, however the necessary institutions have not yet caught up to public opinion.

Specifically, when public opinion polls are compared between 1997 and 2013, an increasing number of people support abortion where a mother's life is at risk. In instances where a woman's health, either mental or physical, is negatively affected by a pregnancy 70 percent supported abortion in 2013, compared to only 14 percent in 1997. As these polls clearly indicate that Irish public opinion is increasingly in favour of allowing for abortion in certain circumstances we are left with the question, why has the Irish state refused to legislate after the *X case* of 1992?

The answer may lay in institutional theory, which focuses on process of change (Streeck and Thelen, 2005, p. 8). For a growing body of institutional theory, rather than

abrupt change in response to 'big shocks' (as was the case in Quebec following the ruling in *R. v. Morgentaler* in 1988), there is a growing focus on "incremental change with transformative results" (Streeck and Thelen, 2005, p. 9). This is certainly consistent with the models of conversion and layering proposed by Hacker (2005). Practically speaking, this suggests that political change often lags behind social change, and that public policy on abortion will become liberalized for a potentially lengthy period before that shift is reflected in policy change. That is especially true in path-dependent societies such as Ireland that have lacked a "critical juncture," thus allowing "a dominant political coalition [to] successfully fend of all attempts…to alter the political course" (Peters, Pierre, and King, 2005, p. 1277-78).

Conclusion

At a structural level, what is most striking about the ways that Irish pro-choice groups have mobilized around reproductive rights is that their aim is often to increase the availability of travel and education for women seeking abortion. What has been largely absent is a movement towards the legalization of abortion in Ireland itself (aside from the group 'Safe and Legal in Ireland'). Perhaps, Ireland's close geographical proximity to other states who offer abortion services has influenced Irish feminists focus on rights to travel and education, rather than legal abortion in Ireland. As Ann Furedi (2008) argues, "One of the main reasons that abortion remains illegal [in Ireland] is because they can export their problem, because women can travel" (as cited in Mollmann, 2010, p. 16)

Variables examined in previous chapters – nationalism and Catholicism – form a part of the broader political opportunity structure that shapes and constrains the viable

options available to the pro-choice movements in both Ireland and Quebec. As a result of the different options and constraints that present themselves to these women's movements, each has opted to pursue divergent political strategies in attempt to secure advancement of abortion rights.

Chapter 8: Authoritative Agency

> Irish society is today faced with a serious choice. It is very possible that an abortion regime will be introduced into this country, thereby for the first time overturning in law the fundamental principle of the inviolability of innocent human life (Bishop Brendan Leahy, 2013).

> I am honoured to receive the Order of Canada today…Canada is one of the few places in the world where freedom of speech and choice prevail in a truly democratic fashion. I'm proud to have been given this opportunity, coming from a war-torn Europe, to realize my potential and my dream, to create a better and more humane society (Dr. Henry Morgentaler, 2008).

We began this journey by asking the question, how is it that two similar jurisdictions can have such drastically different policies surrounding abortion access? On the surface it may seem that a unique form of Irish nationalism, coupled with strong Catholic values could explain Ireland's conservative position, or perhaps simply Irish public opinion is unsupportive of reproductive choice. Upon closer inspection, as the previous chapters have indicated, none of the popularly supported variables accounts for Ireland's restrictive stance towards reproductive rights. Together, though, these have prevented or constrained potential political opportunities that may have been otherwise available to the Irish pro-choice movement- opportunities that certainly were available in Quebec. Indeed, political opportunity structure suggests that policy change is related to the presence of institutional opportunities to help facilitate it, and limited by constraints upon such opportunities (Tarrow, 1998, p. 71). This is, to some degree, the case with abortion policy in Ireland, and "when an issue is 'closed' and there is little or no opportunity to effect change in current policies, movements and counter-movements are unlikely to form" (Meyer and Staggenborg, 1996, p. 1636).

While Ireland is indeed a historically nationalist as well as Catholic nation, the previous chapters have demonstrated that neither of these variables can be seen as the complete explanation to Ireland's continued resistance towards legalizing abortion. When we consider the opinions of Irish citizens themselves, polls suggest that 84% of people believe that abortion should be allowed in at least some circumstances (Collins, 2013). Perhaps drawing upon Quebec's reproductive rights movement we can uncover the missing ingredients to a successful movement. Quebec offers an example of a nationalist and historically Catholic population who was able foster a successful reproductive rights movement.

Perhaps then the reason for Ireland's continued conservative approach to abortion policy is not found in a variable that exists within Ireland, but rather, lies in a variable that is absent from the institutional framework within Ireland and within the Irish reproductive rights movement. This chapter considers the role of elite support for the reproductive rights movements in both Quebec and Ireland. The presence (or absence) of elite support is an important variable in providing opportunities for social movements to gain ground and ultimately help to explain large-scale policy change. Meyer and Staggenborg, for example, assert that "the availability of elite support is one important aspect of a favourable political opportunity structure" (1995, p. 1642) while Tarrow has identified the presence of "influential allies" as an important variable in helping to facilitate opportunities for collective action (1998, p. 79).

Support from members of the elite in Ireland and Quebec often falls on opposite sides of the pro-choice/ pro-life debate. When considering the role of individual agency, I begin by offering an explanation of the key variable that separates Ireland from Quebec,

with regard to reproductive rights, namely the absence in Ireland of authoritative agents or elite supporters who advocate on behalf of reproductive choice. Where in Quebec, feminists were able to rally behind figures such as Dr. Morgentaler (and to some extent Justice Wilson), in Ireland there were no such figures who advocated for abortion access. Indeed, in Ireland, Justice McCarthy simply suggested that the abortion issue needed to be addressed but did not elaborate further. Morgentaler was a central figure to Quebec's reproductive rights movement as he not only lobbied in favour of legalized abortions, but actually performed the procedure in his private clinics. Wilson's significance lies in the fact that she was a woman who held the prestigious position of Supreme Court Justice, thus giving her influence over Canadian law. Conversely, in Ireland, members of the elites who could foster legal and political change, such as members of government or the Catholic Church, are in most instances opposed to greater reproductive rights.

As this dissertation has argued throughout, different opportunities and constraints have presented themselves to the pro-choice movements in Ireland and Quebec as a result of Catholicism, nationalism, and various legal developments. This chapter explores the effects of authoritative agents, another important variable, in explaining the divergent outcomes between abortion policy in Ireland and Quebec. These authoritative agents may be seen as the 'pushers' who are successfully able to utilize various political opportunities to advance access to abortion. In Quebec, there have been more opportunities for these agents than in Ireland as a result of the differing opportunities and constraints presented by Catholicism, nationalism, and legal developments.

Considering the agents at play, it is necessary to acknowledge that, more than just support the reproductive rights movement, Dr. Morgentaler was a unique actor as a result

of his ability and willingness to actually perform abortions in defiance of the law. This was important to the cause of greater reproductive rights because in addition to women speaking out against their inability to obtain an abortion in Quebec, a medical professional was also speaking out against his inability to (legally) perform an abortion. Ultimately, it was Morgentaler who initiated a successful legal challenge that facilitated women gaining the ability to legally access abortion. In Ireland, there was an absence of a medical professional who spoke against his or her inability to legally perform abortions and became a central figure in the push for legalized abortion, and relatedly, nor was there a medical profession who actually provided abortions in defiance of the law who was then in a position to challenge said law.

One key difference between Ireland and Quebec seems to be that the latter had a number of strong feminist interest groups, notably the Front de liberation des femmes (FLF) and the Federation des femmes du Quebec (FFQ), who aligned themselves with the nationalist project, and pushed for reproductive choice in Quebec from within the bigger project (Maille, 2004). Conversely, in Ireland, the opportunities for feminists to form a strong connection to a larger nationalist project were not available and as a result Irish feminist leaders often focused on increasing access to abortion abroad. This was indeed a strategic plan on the part of Irish feminists, as securing access to travel and information were most relevant to the Irish case where women could indeed travel to neighbouring states to obtain an abortion. Irish feminists' focus on securing a right to travel and to information is also explained, in part by Ireland's continued criminalization of abortion, which would have any woman obtaining an illegal abortion in Ireland punished as well as

the medical doctor who performed the abortion. This may suggest that Irish feminists were simply working around the state enforced institutions that surrounded them.

Authoritative Agents/ Elite Support

Another defining variable of Quebec's reproductive rights movement was the presence of the support of elites, or authoritative agents, who publically championed for a woman's right to abortion (Meyer and Staggenborg, 1996, p. 1642; Tarrow 1998, p.79). Two of these, Dr. Henry Morgentaler and Justice Bertha Wilson are explored below. Each contributed to the overall success of the movement, opening windows of opportunity which the women's movement was able to then use to its advantage. In Quebec, Morgentaler was willing to advocate and publicly defy a law that he viewed as unjust, and face potentially significant legal penalties in the process. This in turn gave the pro-choice movement a figurehead to base their legal actions on, and eventually successfully challenged legislation around the criminalization of abortion. Justice Wilson, the first woman appointed to the Supreme Court of Canada, in her opinion in the Court's ruling in *Morgentaler*, explicitly championed a woman's right to control her own body. Her position opened the opportunity to reframe the issue from one of fetal rights to one of women's rights.

The important role played by elites in providing support for protest movements is a crucial element in literature on political opportunity structure. Authoritative agents refers to influential actors and publically known figures who champion a certain political cause (in this case the advancement of pro-choice policy) and directly or indirectly become identified with, and an advocate for, the policy initiatives of a given social

movement. As influential actors, the backing of key elites helps provide the protest movement with publicity, legitimacy, and an opportunity to advance their issue to a higher degree than if these elites were silent on the matter (or worse, publically opposed). As David S. Meyer and Suzanne Staggenborg assert, "the availability of elite support is one important aspect of a favourable political opportunity structure" (1996, p. 1642). Likewise, Sidney Tarrow highlights the impact of what he calls "influential allies" in providing opportunities for social movement (1998, p.79). These authoritative agents are not themselves responsible for bringing about policy change, though Morgentaler certainly comes close in the Quebec/Canadian case, but help provide an opportunity for pro-choice movements to bring about more liberalized policy.

Interestingly, Justice Bertha Wilson served as a Justice on Morgentaler's highly publicized and successful challenge of Canada's abortion laws in 1988. These two figures, Morgentaler and Wilson, added an element of authoritative agency to the Quebec and more generally Canadian reproductive rights movement which would prove invaluable in guaranteeing a woman the right to control her reproductive autonomy and closing the door on constitutional protections of fetal rights.

In direct contrast to Quebec/Canada, Ireland lacked such authoritative agents to spear head the reproductive rights movement. In fact, the authoritative agents that have operated inside Ireland on the issue of reproductive rights have tended to work against the interest of the pro-choice movement. While "elite support" and "influential allies" are an important part of the literature on political opportunity structure, these authoritative agents can also work to limit opportunities to social movements, as has been the case in Ireland. Meyer and Staggenborg, for example, note that "elites may find a way to thwart a

movement…" and may also "…sponsor or heavily support counter-movements" (1996, p. 1642).

Perhaps not surprisingly, in the debate over abortion in Ireland, these figures have tended to be from the Catholic Church, and include various archbishops, and notably Cardinal Sean Brady, as well as institutional actors, such as Justice Rory O'Hanlon or of the Irish Supreme Court. The important fact is that contrary to the role played by authoritative agents in Quebec and Canada as a whole, these figures have worked against creating opportunities for the Irish pro-choice movement, and have worked instead in support of the conservative status quo. As a result, feminist have continually been required to look outside their borders for ways to advance reproductive rights in Ireland, and even these efforts have been relatively conservative (at least in comparison with an assertive reproductive rights movement in Quebec). Below I raise the question, if Ireland has not historically been home to authoritative agents who can champion the movement towards greater reproductive rights, then what will be the way forward in this case? Perhaps the answer for Ireland lies outside their borders, rather than within?

Role of Dr. Morgentaler and his supporters

For many, "Canada is a different place because of Morgentaler" (CBC, "Laws and Mores", 2011). In the 2011 documentary entitled "Laws and Mores": The Legal Battles of Dr. Henry Morgentaler," Morgentaler's defence lawyer during his legal battles in Quebec, Claude-Armand Sheppard, explains that during the 1960s abortions were performed in back-alley type facilities by people known as 'butchers,' who were often people with little or no medical training, thus causing many health risks to the women receiving these illegal abortions (CBC, "Laws and Mores", 2011).

Geographically speaking, at this time, Canadian women had very little choice with regard to where to pursue an abortion as the procedure remained illegal in the nearby United States until 1973 following *Roe V. Wade*. Morgentaler and Sheppard were appalled that women were either putting their lives at risk in order to obtain a procedure which Morgentaler believed should be available to all women within the first three months of pregnancy, or having to travel abroad in order to obtain one in a jurisdiction where it was legal or where they could remain anonymous. When discussing abortions more generally speaking, Morgentaler used language of responsibility, saying that women should choose how to responsibly deal with their own pregnancies, thus emphasizing the autonomy and ability to choose for women. Morgentaler also argued that, in a civilized society, he was shocked that women still did not have the ability to control their own bodies. Once again, clearly for Morgentaler, the emphasis within the abortion debate should be on women's ability to choose, a line of reasoning that has not been apparent in the Irish case.

A major catalyst for Morgentaler's decision to close his family medical practice and create a number of private clinics was the fact that during the time when TAC (Therapeutic Abortion Committee) approval was required for an abortion, most TACs were denying women abortions. In fact, Morgentaler publicly complained that TACs were often stacked with Catholic Doctors, who, for theological reasons, were denying women abortions (CBC, "Laws and Mores", 2011).

By the early late 1960s and into the 1970s, in Montreal it was publicly known that Dr. Morgentaler was the only doctor who would perform private abortions without the consent of a TAC. As a result, he often performed abortions for members of the elite or

bourgeoisie within society, which troubled Morgentaler greatly. Judy Rebick, who was the president of the National Action Committee on the Status of Women (NAC) from 1990 to 1993, stood alongside Morgentaler throughout his legal battles, and started her work with Morgentaler in the late 1960s by recommending women to an "underground referral service" of abortions performed by Morgentaler.

For opponents of Morgentaler from the pro-life movement, he was performing abortions purely for selfish reasons as he hoped to gain financial wealth as a result of his private clinics. For others who knew Morgentaler on a more personal level, his desire to create private abortion clinics came from a personal desire to help people, particularly women. In an interview Morgentaler explained that during the Second World War he was imprisoned in a concentration camp where his father, mother and sister were all killed (CBC, "Laws and Mores", 2011). During the war, Morgentaler felt helpless, thus creating a personal desire to relieve suffering.

Morgentaler skilfully used the media in his favour to gain attention for the pro-choice movement. In 1970, Morgentaler held a press conference in which he stated that he had performed 7,000 illegal abortions. While the government did not immediately react, police soon began a series of raids on Morgentaler's clinics and began to press charges for procuring illegal abortions. Public support for as well as opposition to Morgentaler were enormous. On May 11, 1970 the Abortion Caravan made its way to Ottawa to rally in favour of a woman's right to reproductive choice. The Caravan consisted of over five-hundred women from across the country that arrived in Ottawa to protest s.251 of the Criminal Code. Once Parliament was in session on May 11th, a group

of thirty-six women began to recite a pro-choice speech, forcing Parliament to adjourn itself for the first time in its history (CBC, Wells, n.d.).

Juries continued to find Morgentaler not guilty, but the Quebec Court of Appeals overturned one of these rulings. Eventually the Quebec government announced that they would no longer enforce abortion laws and prosecute Morgentaler or other doctors who perform safe abortions as juries refused to find them guilty. Generally, juries only deliberated for a short period, often only half an hour.

Morgentaler had difficulty staffing the clinics he opened, as many doctors were unwilling to sacrifice their safety for the abortion rights movement. Dr. Morgentaler was unique in the ways in which he was willing to make himself a martyr for the cause of reproductive freedom in Quebec (and elsewhere in Canada). Without a doctor who was willing to actually perform abortions in private clinics the reproductive rights movement would not have had a centralizing catalyst in their fight for choice and many women would not have had the option to obtain an abortion. Morgentaler's clinics gave women's interest groups a centralizing figure to lobby behind and a clearly defined cause to support. The clinics represented a tangible element to the reproductive rights movement.

In 1988, after the Supreme Court struck down S.251 de-criminalizing abortion, Morgentaler stated that the ruling was a "[v]ictory for common sense and for justice" (CBC, "Laws and Mores", 2011). In 1993, Morgentaler was before the Courts again, this time in the Province of Nova Scotia, arguing that the province's decision to fine private abortion providers between of $10,000 to $50,000 per abortion was unconstitutional. Once the case reached the Supreme Court, the Court agreed with Morgentaler and found that the government of Nova Scotia's decision to fine abortion providers was in fact

unconstitutional as it was not an example of the regulation of health care (as the province alleged), but rather an exercise in criminal law, which falls under federal jurisdiction.

R v. Morgentaler, 1993 illustrates that the influence of Morgentaler's legal battles were not limited to Quebec and Ontario, but rather he expanded his quest for reproductive choice into the Maritime Provinces. As Morgentaler's most recent (prior to his death in 2013's) legal battle in New Brunswick illustrates, the limited access to publically funded abortion clinics in eastern Canada continues to present a challenge to the pro-choice movement[12].

In 2008, twenty years after Morgentaler's victory before the Supreme Court, Canadian Governor General Michäelle Jean awarded Morgentaler the Order of Canada, an award presented to Canadians for their contributions to the country (Ottawa Citizen, 2008).[13] The move to have Dr. Morgentaler considered for the Order of Canada came from Carolyn Egan of the Ontario Coalition of Abortion Clinics (OCAC) (Ottawa Citizen, 2008). Morgentaler's receipt of the Order of Canada was met with opposing reviews from members of the pro-life and pro-choice movements, with some pro-life supporters suggesting that other recipients of the award should refuse the award in protest. On the other hand, members of the pro-choice movement applauded the Governor General's decision to award Morgentaler the Order of Canada, some even argued that it was long overdue (Ottawa Citizen, 2008). Regardless of one's position on the debate over reproductive rights, one thing is clear, that to be awarded the Order of

[12] As of January 1, 2015, the Premier of New Brunswick, Brian Gallant removed the legal restriction that in order for an abortion to be performed in New Brunswick a woman must have written consent from two physicians. Under the new law, abortions will still need to be performed only in hospitals, however they may now be performed by general practitioners, no longer requiring a specialist (CBC news, "New Brunswick abortion restriction lifted, 2014).

[13] The Order of Canada was instituted in 1967 to honour those who have "enriched the lives of others and made a difference to this country" (Ottawa Citizen, "Morgentaler Named to Order", 2008).

Canada symbolizes the tremendous impact Morgentaler had. One could not fathom the Irish state bestowing an equivalent honour on an abortion provider, especially one who, for years, operated in defiance of the law.

Support for Morgentaler came in all forms, for example Alan Cooper, the Crown Attorney who once prosecuted Morgentaler said,

> I believed that then and I still believe that. If a person wants an abortion, that is her business. I don't think you should make somebody have a baby who doesn't want to. I knew 90 per cent of Canada was against me. Dr. Morgentaler was like a national hero. Even devout Catholics were coming up to me during the trial and saying: 'How can you prosecute him?' Even my parents said that to me once (Alan Cooper as cited by Martin, 2013).

While Morgentaler's greatest influence on the reproductive rights movement was his drive to protect reproductive choice by first opening private abortion clinics himself and second by challenging Canada's abortion laws, his legal victory in 1988 may not have been possible without the judicial support of Supreme Court Justice Bertha Wilson.

Role of Justice Wilson

In contrast to Ireland, in Quebec (and Canada broadly speaking), a uniquely female perspective on abortion was included in judicial interpretations of abortion laws, specifically as they were embodied by Justice Bertha Wilson. If we recall from chapter four's outline of the legal history of abortion in Quebec, in her comments on the *Morgentaler* case, Justice Wilson explicitly brought women's voices to bear on the issue of abortion when she stated:

> This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and

> usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person. It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma (*R v. Morgentaler*, 1988, per Wilson).

Justice Wilson's judgement in Morgentaler clearly brings to light the experiences of pregnancy and abortion that affect women as a distinct group. In Ireland, the legal focus emphasized the rights of the fetus over the rights of women, while, at the same time, the focus of women's rights activists was securing a right to travel and to access information and the rights of women to control their reproduction was never at the forefront of the women's movement. These first-hand experiences illuminated by Justice Wilson were not present in Ireland, where there was not someone willing or able to successfully champion them in the public forum.

When considering Justice Wilson's words, the clear distinction between the way that Ireland has treated abortion laws and access to the ways abortion debates are portrayed in Quebec comes to light. While in Ireland, s.40(3)(3) aims to provide protection for the life of the unborn as well as the woman in question, in Quebec, abortion debates surrounding s. 7 are focused on the right of life, liberty and security of the pregnant woman, thus including women's experiences in law making. Similarly, the Court has never been open to arguments championing fetal rights.

In her judgment in *Morgentaler*, Justice Wilson famously declared that the issue and repercussions of pregnancy and abortion could only be fully understood from a

female perspective (*R. v. Morgentaler*, 1988). This understanding of abortion as uniquely affecting women led Justice Wilson to argue that s.251 violated women's section 7 rights on the grounds of a violation of security of the person and of liberty. Justice Wilson defined liberty as "[The ability] to decide what to do and how to do it, to carry out one's own decisions and accept their consequences…" and also argued that liberty or autonomy is a central tenant of the Canadian democratic system (*R. v. Morgentaler*, 1988, at para 165). By failing to provide adequate access to abortion services, the Canadian state was ultimately infringing upon women's autonomy and choice over decisions relating to her body. As Lorraine Eisenstat Weinrib (1992) explains,

> In reproduction, women are bound up in relationships- with the foetus, with its male biological parent, with family-…but they bear the physical, emotional, psychological, social and work-related burdens of pregnancy and delivery alone…If the state withholds safe medical means whereby a woman who has conceived can say no, it negates the individual woman's autonomy and by extension treats women as reproductive machines (p. 57).

With regard to the reproductive rights movement in Quebec, Justice Wilson's judgement in *Morgentaler* should be viewed as highly progressive and effective in bringing to light the element of female autonomy inherent within debates over reproduction. It is also striking that, as the only female Supreme Court Justice presiding over *Morgentaler*, Justice Wilson was the only one of the seven Justices to conclude that s.251 violated liberty as well as security of the person.

With regard to women's liberty where pregnancy and abortion are concerned, Justice Wilson argued that s.251 "takes a personal and private decision away from the woman and gives it to a committee which bases its decision on 'criteria entirely unrelated to [the pregnant woman's] own priorities and aspirations" (*R. v. Morgentaler*, 1988, at

37). Justice Wilson focused her comments on *Morgentaler* on the argument that abortion is a personal decision which should only be made by pregnant women themselves, with the assistance of their doctors. For Justice Wilson, to prohibit a woman from obtaining an abortion should be considered a violation of her liberty under s.7 because "a woman's decision to terminate her pregnancy falls within [s.7's] class of protected decisions" (*R. v. Morgentaler,* 1988, at para. 37). By denying women the ability and right to decide when to terminate a pregnancy, Justice Wilson argued that women's dignity itself was denied. Specifically Justice Wilson stated:

> To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences, seems to be essential to one's self-respect as a human being, and essential to the possibility of that contentment. Such self-respect and contentment are in my judgement fundamental goods for human beings…If a person were deliberately denied the opportunity of self-respect and that contentment, he would suffer deprivation of his essential humanity (*R. v. Morgentaler,* 1988 at para. 165).

For her, not only did s.251 infringe upon women's liberty to make decisions for themselves and deny them human dignity, it also "exposed [pregnant women] to a threat to their physical and psychological security under the legislative scheme set up in s.251" (*R. v. Morgentaler,* 1988, at para. 163). S.251's limitations of access to abortion services for women thus violated human dignity as well as risked both physical and psychological harm.

A criticism of Justice Wilson's approach in *Morgentaler* comes from Weinrib (1992) who argues that the "shortcoming of this opinion is its failure to make a more supported and consistent legal argument for the position developed" (p. 48). Weinrib (1992) praises Justice Wilson for "suggest[ing] new ways to support *Charter* reasoning,

and most effectively treat[ing] gender equality as a *Charter* norm" (p. 48). In light of this, Weinrib (1992) also critiques her for failing to emphasize the connection between autonomy and responsibility, noting that although a woman may have consented to engage in sexual intercourse, there is not the necessary responsibility to carry a fetus to term and give birth.

With regard to *Charter* interpretation, Weinrib cites the guidelines for gender equality as they are mapped out by s.28, interestingly a point not discussed by Justice Wilson. S. 28 states that "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons" (*The Constitution Act of Canada*, 1982, c. 11, s. 28). For Weinrib (1992), Justice Wilson could have cited s.28's equality provisions in *Morgentaler* by arguing the following:

> Since liberty is guaranteed equally to men and women by s. 28, the state cannot fetter the liberty of women in situations in which men are exempt. Men are exempt 'by nature' from gestation and must be constrained to the responsibility of parenthood through law, women in contrast must acquire exemption from parenthood through law that permits abortion (Weinrib, 1992, p. 53).

Weinrib's statement seems to resemble the logic of Justice Wilson's comments on *Morgentaler*, specifically her sentiment that abortion is something that can only be fully comprehended from a female perspective. Contrary to Justice Wilson, in making this argument she relies on a different section of the *Charter*, suggesting that Justice Wilson could have even gone further. For Weinrib, as pregnancy and abortion physically affect women in a way that cannot be experienced by men, the law should also apply equally to the way that women are able to respond to pregnancy. Weinrib further explains that had Justice Wilson referred to s.28 when considering women's freedom of conscience as it

relates to abortion, she would have been able to argue in favour of providing women with the ability to freely choose to control their reproduction.

Weinrib advances a further critique of Justice Wilson in that she argues that Wilson failed to discuss the history of abortion law in Canada and, in particular the reasons for the creation of the 1969 amendment. A close examination of abortion law in Canada reveals that the "cultural roots of legal restrictions on abortion are fascinating. They lie not in the moral issues that animate today's debate but in efforts to protect women from dangerous substances and unsafe surgical practices" (Weinrib, 1992, p. 53). Reasons for restricting abortion access also included a desire to maintain the status of abortion as a service provided by a "male, university-educated elite [and] out of the hands of traditional healers, many of whom were women" (Weinrib, 1992, p. 53). Another reason for abortion restrictions was a societal desire to maintain a traditional role for women as reproductive agents (Weinrib, 1992; Backhouse, 1983). Considering advances in reproductive medicine as well as the existence of regulated private abortion clinics clearly many of the former reasons for restricting abortion access no longer exist. Comparatively, if we consider the Irish case, women are able to access abortion services abroad, albeit at a significant financial and travel related burden.

A guarantee for the protection of reproductive rights and reproductive autonomy is not without precedent, for example in its General Recommendation No. 24 of the Convention for the Elimination of Discrimination Against Women (CEDAW), which argues that with regard to sexual health education, states "have an obligation to ensure, without prejudice and discrimination, the right to sexual health information, education and services for all women and girls" (Committee on the Elimination of Discrimination

against Women, "General Recommendation No. 24: Women and Health," 1999, U.N. Doc. A/54/38/ Rev.3, para. 18).

When considering Justice Wilson's words, the clear distinction between the way that Ireland has treated abortion laws and access to the ways abortion debates are portrayed in Quebec comes to light. While in Ireland, s.40(3)(3) aims to provide protection for the life of the unborn as well as the woman in question, in Quebec, abortion debates surrounding s. 7 are focused on the right of life, liberty and security of the pregnant woman, thus including women's experiences in law making. To this day the Court, as well as parliament effectively rejects the sec. 7 right to life arguments of the fetus made by some interveners.

Of all of the Justices to preside over *Morgentaler*, it was only Justice Wilson who declared that s.7 contains a guarantee a right to abortion for women (*R. v. Morgentaler*, 1988, at para. 37). Specifically, Justice Wilson argues,

> The right to "liberty" contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting his or her private life. Liberty in a free and democratic society does not require the state to approve such decisions but it does require the state to respect them. A woman's decision to terminate her pregnancy falls within this class of protected decisions (1988, at para. 37).

Although the text of the *Charter* does not set out a specific right to terminate a pregnancy, Justice Wilson argues that this right is integral to women's autonomy, and therefore essential to liberty. As the above quote explains, Justice Wilson was not asking the Canadian government to approve of a woman's choice to abort her pregnancy, instead she was arguing that the state should at least be respectful of a woman's right to control her own body.

Potential Authoritative Agents in Ireland

Ireland was not without political actors; in particular Mary Robinson comes to mind as the first female President of Ireland. Robinson participated actively in politics as a lawyer as well a member of Ireland's Dáil (Irish Parliament) from 1969-89 (Lucas, 2003). Although Robinson was elected as President in 1990, the Irish parliament remained dominated by men. Women constituted only 7.8 percent of the Dáil with only 13 female deputies to 166 males (Smyth,1992). Perhaps not surprisingly, although Robinson supported a degree of abortion access in Ireland, her influence was quite limited. Rather than focusing on promoting reproductive rights access via abortion she emphasized the need for legal access to contraceptives. She championed an unsuccessful private members Bill before Senate, which argued for the legalization of contraceptives (Barry, 1991). The importing of contraceptives for use by married couples was permitted in 1973 after *Magee v. Attorney General* based upon the constitutional protection of marital privacy (Barry, 1991).

Like the Irish women's movement more broadly speaking, Robinson decided to focus her human rights initiatives toward the international community. In 1997 she resigned as President and took up a position as High Commissioner for Human Rights at the United Nations. Mary Robinson has led a tremendous career as a political activist, however it must be noted that many of her efforts have been focused on international human rights, rather than domestic Irish politics. As a result she did not act as an

authoritative agent who could open opportunities and guide the pro-choice movement through the institutional structures.

Justice McCarthy in Ireland

In contrast to Justice Wilson's outwardly feminist position in *Morgentaler*, in Ireland the court that heard the 1992 *X Case* consisted entirely of male judges. There was however one Supreme Court of Justice member, Niall McCarthy who offered a strong opinion on abortion law in Ireland.

When commenting on failure of the (Oireachtas) Irish legislature to clarify the relationship between a woman's right to life and the right to life of the unborn (as they are outlined in s.40 (3) (3) of the Irish Constitution), Justice McCarthy stated:

> 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 parents of a pregnant girl under age to do? What are doctors to do (*Attorney General v. X*, 1992, at p. 90)

At least one Supreme Court Justice in Ireland argued that it is not the Court's place to decide when abortion will be permitted or restricted. As feminist-legal scholars Marie Fox and Therese Murphy (1992) argue in direct response to the statement made by Justice McCarthy, the Irish government created a sub-committee to decide if the legislature should create guidelines for interpreting s.40(3)(3), which ultimately resulted in the 1992 referenda(s). By exercising judicial restraint in the *X* Case, Justice McCarthy ultimately forced the legislature to act, which in turn resulted in the 1992 referenda.

While Justice McCarthy expressed the opinion that laws regarding abortion rights should not be decided by the Courts, this did not prevent him from commenting further in

the *X* case in an attempt to reconcile the rights of a woman and the unborn. In his judgement in *X*, Justice McCarthy argued that:

> The right of the girl here is a right to life in being: the right of the unborn is to a life contingent; contingent on survival in the womb until successful delivery. It is not a question of setting one above the other but rather of indicating as far as practicable, the right to life of the girl/mother, whilst with due regard to the right to life of the girl/mother, vindicating as far as practicable, the right to life of the unborn (*Attorney General v. X*, 1992, at p. 87).

In light of Justice McCarthy's judgement in *X*, although he argues that it is the responsibility of the legislature to clarify s.40 (3) (3), the Justices of the Irish Supreme Court are also willing to offer an opinion. Justice McCarthy exemplifies a rare example of the rights of pregnant women being brought to light when discussing reproduction. This seems quite unique as in Ireland, particularly after the creation of s.40 (3) (3), conversations about reproduction often centre on the rights of the fetus, at times to the neglect of the rights of pregnant women. It should also be noted that Justice McCarthy is speaking in direct reference to the *X* case, illustrating the fact that this case caused tremendous discomfort in Ireland, thus causing people to question the clash between the rights of pregnant women and those of the unborn. Although s. 40(3)(3) was ultimately left to the legislature and subsequently a constitutional referenda to interpret, the commentary of Justice McCarthy illustrates that individual judges in Ireland have also been active (albeit less so than the legislature, and in Quebec, Justice Wilson) in discussions surrounding reproductive rights. It is important to also note that in Ireland it is primarily the male Supreme Court Judges, the (male) Attorney General and male members of the legislature who have interpreted s. 40(3)(3) of the constitution, thus

neglecting to take into account the voices of women themselves (*Attorney General. v. X* , 1992).[14]

As the discussion above illustrates, the role of agency is quite significant in distinguishing the reproductive rights movement in Quebec from that of Ireland. Agency, particularly as it is evidenced by the actions of Dr. Morgentaler and Justice Wilson, played a unique role in Quebec's abortion movement. By contributing a sort of authoritative support for the reproductive rights movement, Dr. Morgentaler and Justice Wilson were able to give the pro-choice movement two key figure heads to place at the forefront. Clearly without Morgentaler's unwavering support for the reproductive rights movement, women in Quebec would not have their present level of reproductive autonomy, or at least would not have had it as early as they did. As a medical doctor, Morgentaler brought with him a certain element of legitimacy and prestige to the abortion debate. This legitimacy and credibility made Morgentaler a powerful figure-head, who quickly became the legal representative for many women**.**

As is evidenced by the story of 'Aisling' described in chapter six, many medical doctors in Ireland are hesitant to offer information on abortion, let alone perform the procedure. Thus, Morgentaler, and his colleagues' actions in Quebec (and later in Toronto) represent a form of acceptance of abortion by a select few members of the medical community. This type of acceptance of abortion is absent in Ireland.

The second key figure discussed in this chapter was Justice Bertha Wilson, a female Supreme Court judge who brought a unique perspective to the abortion debate via her judgement in *R. v. Morgentaler, 1988.* Wilson used her position on the bench to give

[14] It should be noted that while women have been excluded from interpreting s.40(3)(3) in a judicial capacity, women's voices were included in the 1986, 1992 and 2002 referenda surrounding abortion and s.40(3)(3).

credibility to the argument that debates over reproduction are understood by women in ways which physically cannot be understood by men, thus arguing that pregnant women should have the right to control their reproductive choices.

In direct contrast to Ireland, the very presence of individuals such as Morgentaler and Wilson in Canada gave added strength to the pro-choice movement, both in Canada and by extension in Quebec. In Ireland there were no such figures in positions of authority who championed for women's reproductive autonomy. Instead, in Ireland, a presence of great authority, the Catholic Church strongly supported the pro-life movement. Although in the *X Case* Justice McCarthy argued that s.40 (3) (3) required further legal clarification, particularly where the rights of the unborn directly clash with a woman's rights, he, nor any other Irish High Court Justice championed for women's reproductive choice.

Contrasting the situation of Ireland with that of Quebec, the presence of authoritative agents in the broader Canadian context, such as Dr. Morgentaler and in a different way, Justice Wilson, were incredibly significant in the movement towards greater reproductive rights as they created figureheads for supporters of legal abortion. Morgentaler was willing and able to directly challenge Canada's ban on abortion, thus resulting in its de-criminalization. In Ireland, however, the lack of a similarly influential figure helps to explain the lack of access to legalized abortion in Ireland.

Along with the presence of agents who sought to change abortion law directly, the structural elements for reform also existed in Quebec in ways that they do not presently in Ireland. Specifically, *the Charter* and the individual rights it affords women do not

exist in the same way in Ireland. On the contrary, in Ireland s.40 (3)(3)'s fetal right to life provision offers a strong structural barrier against the liberalization of abortion rights.

As the history of the reproductive rights movement in Ireland has indicated, it is unlikely that significant change will come from legal officials within Ireland itself. Thus, as the actions of Irish based feminist groups have illustrated, the best route to securing access to abortion for Irish women is to look outside of Ireland itself. Indeed, as the Irish parliament's decision to finally legislate on the ruling in the *X Case*, as a direct result of external pressure from the ECHR indicates, if change is to take place in Ireland, it will come from abroad.

Chapter 9- The Significance of Multilevel Governance

> After Ireland murdered a pregnant Indian dentist, after denying her an abortion as it was against their religious beliefs, we ask the very fundamental question – Are Ireland's Catholic Abortion Laws responsible for Savita's death? Well, it turns out that Savita could have lived if the Irish Parliament had stopped being religious fundamentalists long enough to replace the old draconian law that bans abortion, with a Supreme Court judgment that allowed abortion if the life of mother was in danger (Agarawal, 2012).

This chapter moves from chapter eight's consideration of elite agents to the realm of multilevel governance. I begin by considering the impact of multilevel governance, or more specifically, European law in Ireland and federalism in Quebec on reproductive rights, making particular note of the role that physical geography plays in each case. Second, I discuss international political institutions and law and explore the ways which abortion laws in Ireland are gradually beginning to liberalize, albeit as a result from external rather than internal pressures.

In addition to the role authoritative agents played in the pro-choice movement's journey to bring about political change in Canada and by extension, Quebec and the comparative lack of such support in Ireland, the role of international political institutions is also an important variable. It is moreover one that is slowly helping to bring about a more liberalize regulatory framework in Ireland.

Several scholars, including Maureen Baker (2008), Siobhán Mullally (2005), Ruth Fletcher (1995), Rebecca J. Cook and Bernard M. Dickens (2003, 2013) and Rachel A. Cichowski (2004) have explored the role of international or multilevel governance on abortion rights. For Cichowski (2004) and Baker (2008) multi-national governing bodies

such as the UN and the European Court of Justice signify an important step for women in their journey towards securing access to an abortion.

In particular, Cichowski (2004) argues that with regard to women's rights broadly speaking, "…supranational constitutionalism can lead to the expansion of rights…Women, as legal experts, group activists, and individual litigants, have become integral components in the process of European integration" (p.507-508). While by no means a guarantee for liberalization, Ireland's entry into the EU, and successive rulings by various EU courts, have provided a better opportunity than what could have been provided for otherwise, though the final outcome has yet to be determined.

By moving from the local, individual level of analysis to the larger international realm, we are able to envision a possible future for the reproductive rights movement in Ireland and other socially conservative countries, such as Poland, which share important parallels with Ireland in regard to the potential impact of EU law. It was the 2010 case *A, B and C v. Ireland* which finally forced Ireland to address the question of when a legal abortion may be permitted to save the life of the potential mother. Thus, for Ireland in the absence of institutional actors willing to change abortion policy, or elite agents willing to advocate for change to Irish law, change must come from outside Irish borders.

The chapter begins, however, with an analysis of the impacts of federalism on abortion access in Quebec. Unlike Ireland, where multilevel governance has had a liberalizing impact on abortion access, federalism's impact on Quebec has been much more muted, as the provincial government in Quebec reached the point where it refused to prosecute Morgentaler (after previously doing so and him being acquitted) for performing abortions, despite the fact that doing so remained illegal at the time under

federal law. Quebec was, and in many respects still is, more liberal in regard to abortion policy that the rest of Canada.

Reproductive Rights Movement: Federalism's Impact in Quebec

In comparison with Ireland, intergovernmental relations have had less of an impact on the legality of abortion and more on the delivery of services in Quebec. While criminal law (including the historic criminalization of abortion) is a policy area governed at the federal level in Canada, the enforcement of this law is left up to the provincial government, as was explained in chapter four. In the case of Quebec, the provincial government was eventually compelled to stop prosecuting abortion, effectively permitting it (despite its technical legality) close to 15 years before it was legalized at the federal level. This suggests that federalism, or at least the federal government, did not have a liberalizing impact on abortion access in Quebec. It was, however, liberalized in defiance of the federal government. This suggests that provincial jurisdiction over healthcare, and the administration of justice have provided opportunities for policy change on abortion at the provincial level, particularly in Quebec.

As also noted in chapter four, various aspects of public policy that fall under the federal government are either directly or indirectly related to abortion policy, including the transfer payments for health care that the federal government provides to the provinces, the regulation of criminal law, and the maintenance and operation of the Supreme Court of Canada.

Abortion, like many policy areas in Canada, in practice overlaps into the jurisdiction of both the federal and provincial government. The influence of these

multiple levels of governance most impacts reproductive rights in Canada in terms of the resulting access to abortions, which in reality vary great between the provinces. While abortion access is regulated, criminally at least, by the federal government, the delivery and provision of these services is regulated by the provincial governments, making for a situation in which access is legal, but not uniformly available. Thus, although it was still illegal to obtain an abortion as a result of the federal government's criminal prohibition on them, some women in Quebec (at least those with access to Montreal) were able to obtain one, with relative ease, from the mid-1970s to 1988. This is in part because, as previously noted in chapter four, one aspect of Quebec's campaign against the federal government's influence and the related emphasis on promoting a secular nationalism as permitted the practice of abortion in spite of the federal government's criminalization of it (Milne, 2011: 4).

Interestingly, then, when the federal Supreme Court of Canada struck down the *Criminal Code's* provisions, effectively legalizing abortion coast-to-coast and facilitating a certain liberalization in many provinces, it changed little in terms of the status quo reality for women in Quebec, since abortion access had already been comparatively liberal since the mid-1970s. What it did, then, was legalize a process that was already both well-known and occurring, and remove any semblance of legal repercussions that women or their doctors were potentially liable for.

The ability for women to actually access as abortions in practice varies greatly across the country (Haussman, 2005). This is especially true in areas of rural Canada and Atlantic Canada, such as in Prince Edward Island, where there are neither hospitals nor clinics that perform abortions, and in Alberta where there are only two hospitals where

abortions are performed (AARC, 2014). This is a result of each province determining what is or is not medically required. Thus, feminists have had to tackle access to abortion in many different jurisdictions, despite the *Morgentaler* decision. As Melissa Haussman explains, "there were 191 Canadian hospitals performing abortion services in 1990 but only 163 performing them as of 2000 (Haussman, 2005, p. 93, CARAL fact sheet, "Abortion Services"). The declining number of abortion service providers in Canada presents a serious threat to women's reproductive autonomy. It is the battle for greater access to abortions which now faces Canadian feminists.

In Quebec, prior to 1988, the pro-choice movement focused much of its attention on securing decriminalization at federal level while simultaneously securing access (in violation of the law) within the province, and has since focused largely on improving access at the provincial level. Quebec's geographical distance from other countries, with the exception of the United States (where after *Roe v. Wade*, abortion was legalized, to some degree, in 1973), makes it relatively isolated and thus difficult and costly to cross national borders and travel abroad in order to obtain an abortion in a jurisdiction where the process is legal.

In Ireland, conversely, there are many countries (most notably the United Kingdom), to which one can easily travel and obtain a legal abortion. As a result, the pro-choice movement in Quebec found it necessary to press for internal solutions and access, at the domestic level, to abortions, whereas the Irish pro-choice movement instead focused on securing better access to travel to obtain abortions in the nearby United Kingdom. Ultimately, while federalism in Canada has divided abortion policy between the federal government (criminal regulation) and the provincial governments (provision

of services), its specific impacts have been limited to the realm of service provision, rather than the legality of abortions themselves.

This is not to suggest that the historic and contemporary struggles facing the Quebec women's movement (as well as the women's movement in English Canada) are any less significant than those of their Irish counter-parts, but rather that the challenges before them are shaped by different circumstances based on law and geography. For the purpose of this dissertation, I will now turn to a consideration of the impact of multilevel governance on Ireland, where until very recently abortion had remained illegal, and pressures that resulted from multilevel governance ultimately helped to bring about some form of liberalization in Ireland. A future project could certainly trace the evolution of access to abortion in Ireland, as compared to Quebec, once legalization occurs.

Impact of the UN, EU and ECHR

As Melissa Haussman (2005) explains, " …The site of contestation over women's sexuality and reproductive rights has moved increasingly to the international and transnational levels, as has indeed happened with trade agreements across the world and the consequent new political and social frameworks" (p. 169). Thus, for Haussman women need to partake in international discussions over reproduction, employing the international means available to them**.** As the Irish women's movement has illustrated, looking outside of Irish borders for solutions to problems involving contraception and information has proven historically successful. These supranational and international institutions are not only important in and of themselves in providing an opportunity to

secure a more liberalized abortion policy, but also necessary as a result of the lack of potential for institutional change with Ireland.

In Ireland, this turn towards international influences includes the European Union (EU) and its various laws, institutions, and directives, as well as a discussion of international law and the various ways in which the United Nations (UN) and other international/multinational bodies such as the Council of Europe have attempted to influence policies surrounding reproductive rights in Ireland. Ireland's entry into the EU (then the EEC) necessitated a certain loss of, or at least shift in, sovereignty in specific policy areas. Ireland's membership in the UN, for example, entails no direct loss of sovereignty, the UN and its various conferences on reproduction offer moral guidelines and pressures associated with a desire for international legitimacy. In practice, then, neither Quebec nor Ireland has complete sovereignty over issues of reproductive rights and freedoms, and the ways in which other political systems and actors impact public policy in Quebec and Ireland must be examined. As the below discussion will explain, the very concept of sovereignty has become increasingly complex, particularly where multi-level governance is concerned. To gain a clear understanding of reproductive rights laws in each case we must consider the influence of various influences on reproductive rights, both within and outside the state.

To situate Ireland's position on reproduction with regard to other nations within the U.K., I now briefly outline the differences in reproductive rights within the United Kingdom as compared to the Republic of Ireland, focusing on abortion access in England, Wales, Scotland and Northern Ireland. I have chosen to include this comparison as a means of outlining the abortion related laws in jurisdictions that are of close

proximity to Ireland, as these are the locations where many Irish women travel to obtain the procedure. Although Ireland is completely sovereign from the United Kingdom, the close proximity of the U.K. to Ireland, coupled with EU free movement legislation, has indirect impacts on reproductive rights policy. While the U.K. is unable to directly change, mandate, or override any laws passed within the Republic of Ireland, some British actors are still able to influence the debate on reproductive rights in Ireland by providing abortions for Irish women within the borders of the U.K. The fact that many Irish women travel to the England to obtain abortions is an important point of contention within Ireland. As we have seen in the earlier chapters, Ireland has sought to place limitations on women's rights to travel. While unsuccessful, the very fact that Irish politicians and voters are aware of the number of abortions performed on Irish women in the U.K. cannot be overlooked in any discussion of reproductive rights in Ireland as this has, and continues to, impact the evolution of Irish law on reproductive rights and freedoms.

By way of contrasting Ireland's restrictive stance on abortion with abortion access in the U.K., Caroline Davey (2005) offers statistical evidence illustrating that in England and Wales in 2003, 80 percent of abortions were funded by the National Health Service (NHS). Similarly, in Scotland in 2009, 99 percent of abortions were funded by the NHS. At present in England, Wales and Scotland the target waiting time for an abortion is 72 hours and one week is the maximum wait time under the NHS' guidelines (Davey, 2005). With regard to Northern Ireland, Davey (2005) explains that as the 1967 *Abortion Act of the United Kingdom* was not extended to Northern Ireland, and it remains incredibly difficult for women in Northern Ireland to access legal abortions at home.

Along with various influences from states within the U.K., Ireland is also strongly affected by members of the larger international community, namely the EU. In particular as a member of the EU, Ireland is subject to the provisions of European treaties and the implications of supranational constitutionalism which stem from this (Cichowski, 2004). As a member of the EU, Ireland and its citizens are bound by EU laws, particularly those which protect the freedom of movement, trade and information within the EU. Not only do British law and regulations impact the discourse, limitations, and possibilities of reproductive rights in Ireland, so too does European Union law. Unlike the United Kingdom, which does not exert any legal sovereignty over Ireland, the European Union does, and its various directives and legislation have significant implications on reproductive rights in Ireland. As a member of the EU, Ireland is formally bound by supranational laws and conventions (Cichowski, 2004).

EU membership means that Irish women have the right, through European legislation, to travel throughout the European Union, and thus are free to travel to procure an abortion. Indirectly, the more liberal stance of other EU member states towards reproductive rights could potentially pressure Ireland to liberalise its abortion laws. In practice, although abortion is widely available throughout the EU, this has not yet led to a liberalisation of abortion law in Ireland. Rather, Irish women continue to have no legal choice but to travel to obtain an abortion. For liberal politicians and law makers within Ireland, membership within the EU signified new hope for a secular future, one which could have led to a turn away from the strong influence of the Catholic Church.

This suggests, on some level at least, an opportunity for the liberalization of reproductive freedom in Ireland. As the Catholic Church has had an overarching impact

on the lack of reproductive freedom in Ireland, it follows that the EU's more secular – and liberal – legislation provides a new avenue of opportunity and resistance for the pro-choice movement in Ireland, and a corresponding decline of sovereignty for the Irish state. As Brian Girvin (1996) argues, membership in the EU signifies a lessening of autonomy for individual states; however, he rightly notes that this does not equate to the end of national sovereignty. The European treaties outline various powers granted to the European Parliament; however, the Council of Ministers representing individual states holds significant power where individual state action is in question.

While economic matters are often decided at the level of EU law, moral and cultural issues are purposely left for individual states to legislate. For example, at the United Nations International Conference on Population and Development in Cairo in 1994, it was the official position of the EU that abortion policy was to be determined at the state level and would not be legislated by the EU (Girvin, 1996). Other avenues are, however, made available to women via the EU, particularly the right to travel as well as access information. In many ways, then, this position is quite similar to the general focus of Irish feminist groups: no abortion within the state, but the hope for increased education and movement outside of the state. Specifically I consider the use by women's rights advocates of Article 234 of the *Treaty of Rome* or the preliminary ruling procedure which can allow or even require "national judges to ask the ECJ for a correct interpretation of EU law if it is material to the resolution of a dispute being heard in a national court" (Cichowski, 2004, p. 490).

As Rachel Cichowski (2004) explains, although Article 234 does not officially allow the ECJ to directly rule on the compatibility of national and EU laws, "the practical

reality of the ECJ's interpretation of EU law, in a context determined by national legislation, is often a determination of the validity of those national laws" (p. 494). With regard to social provisions preliminary rulings, 40 of 88 rulings include Gender Equality Directives, and in 28 of those 40 cases, the ECJ found that national practices violated EU law (Cichowski, 2004). When specifically considering the number of Article 234 cases that were brought to the ECJ by Ireland between 1971 and 1993, a total of four cases were heard, and in all of the four cases the ECJ ruled that Ireland's law was adverse to EU law (Cichowski, 2004).

Although Cichowski does not comment on Ireland's response to the ECJ's ruling(s) that Irish law was adverse to EU law, the very notion that the legitimacy of Irish law can be called into question by an international body seems to suggest that there are international institutions that provide Irish women's rights groups with an important opportunity to challenge Irish law. In short, the rise of shared sovereignty by virtue of Ireland's membership in the EU logically reduces its national sovereignty, albeit to varying degrees on various issues. Nevertheless this has the potential to expand reproductive freedom and limit the conservative influence of the Irish government's general anti-choice policies on reproductive rights. There are ways, however, that the Irish government has sought to protect and even advance its sovereignty vis-à-vis the EU, especially in the area of reproductive rights, in particular the inclusion of Protocol 17 into the *Maastricht Treaty*.

When considering Ireland's relationship to the EU, it seems particularly relevant to make note of Protocol 17, which provides that "the European Union (EU) law does not affect the application in Ireland to the foetal right to life" (Fletcher, 2000, p. 38). As Ruth

Fletcher (2000) explains, in the aftermath of the *Grogan v. Ireland* and under pressure from pro-life lobbyists, the Irish Government successfully requested the addition of Protocol 17 into the *Maastricht Treaty* which, after its amendment, 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 (*Maastricht Treaty* 'Treaty of the European Union", 1992. Protocol 17).

In light of Protocol 17, the Irish government has found a way to protect specific aspects of sovereignty and, by extension, ensure that EU laws surrounding abortion will not infringe on s.40(3)(3)'s right to life of the unborn.[15]

Legislation regarding issues of abortion has been left to individual states to govern as the EU does not have jurisdiction over these matters. On the other hand, Ireland has explicit constitutional protection for the right of life of the fetus, and both women who obtain abortions and the medical professionals who assist them are subject to legal penalties ranging from up to three years in prison (for medical professionals) to "penal servitude for life" or life in prison (faced by women who obtain illegal abortions) (Mollman, 2010). Thus, Ireland, through both domestic and supranational institutions, has aggressively sought to ensure its sovereignty in this field of public policy in the face of the comparatively liberalizing directives of the EU.

If one accepts, as Ruth Fletcher (2000) suggests, that the EU is largely an economic form of supranational constitutionalism, then, as she notes, the supranational body offers one possible way for pro-choice activists to approach laws on abortion by

[15] At present it should be noted that under EU and ECHR law there is no formal right to life of the unborn or to abortion, nor is abortion considered a criminal offence. This is not to suggest that there have not been formal legal attempts at the extension of Article 2 of the European Conventions Right to Life provision to include fetuses. In both *Vo. V. France (2003)* and *Evans v. United Kingdom (2007)* unsuccessful attempts were made before the ECHR to argue that Article 2 should be applied to fetuses.

framing abortion as an economic service which should be accessible to all women living within EU member states (p.40). This entails, by extension, a diminished focus on women's rights, but may provide similar ends (more liberalized laws) albeit through different means. In both situations, however, appealing to a sphere of power and influence outside (and perhaps even above) the sovereignty of Irish state is the direction followed by the pro-choice movement.

With regard to international arguments and conventions put forth by the United Nations, in 2000 the United Nations Human Rights Committee urged Ireland to ensure that "women are not compelled to continue with pregnancies where that is incompatible with obligations arising under the Covenant"(UN Human Rights Committee, 2000). The United Nations (UN) Human Rights Committee addressed the issues of women's rights in Ireland, where it expressed a concern for the continued presence of "traditional attitudes toward women" as exemplified by Ireland's constitution, notably s.40 (3)(3) (United Nations Human Rights Committee, 2000a).

In July of 2002, the European Parliament issued a resolution "recommending that member states make abortion legal, safe and accessible to all in order to safeguard women's reproductive health and rights," and in January of 2009 they called on member states of the EU to "raise awareness of the right to reproductive and sexual health" (European Parliament, 2002; European Parliament, 2009). While instances such as the case of the EU illustrate how a right to reproductive control can have positive implications for women's autonomy, conversely, legislation such as s. 40(3)(3) of the Irish Constitution's positive right to life of the unborn represent a dangerous legal precedent (Constitution of Ireland, 1937, S. 40(3)(3).

In May of 2009, the United Nations Committee against Torture (CAT) described the criminalization of abortion under any circumstances as a violation of human rights (United Nations Committee Against Torture, 2009). Under the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), one element of Ireland's restrictive abortion policies in particular which requires immediate attention is the lack of information and education on abortion services for Irish women. A guarantee for the protection of reproductive rights and reproductive autonomy is not without precedent; for example, in its General Recommendation No. 24, the Convention for the Elimination of Discrimination Against Women (CEDAW) argues that with regard to sexual health education, states "have an obligation to ensure, without prejudice and discrimination, the right to sexual health information, education and services for all women and girls" (United Nations Committee on the Elimination of Discrimination Against Women, 1999).

In light of the moral pressures exerted by CEDAW and the UN more generally speaking, the position of international institutions such of the UN wield only the power of perceived legitimacy and lack an actual enforcement mechanism with regard to sovereign states. In other words, although the UN and CEDAW can appeal to Ireland's desire for international legitimacy, they cannot legally compel Ireland to abide by their suggestions, and fall short in providing Irish women with a meaningful opportunity to change Irish law, although they certainly provide some degree of moral persuasion.

The importance of transnational bodies such as the UN and the EU has also contributed to an increase in appeals to international human rights law. Whether in the form of human rights courts such as the International Court of Justice (ICJ) or the

European Court of Human Rights (ECHR) or via formal rights protecting documents such as the United Nations Charter of Rights, or as was illustrated in the case of *A, B and C v. Ireland*, the European Convention on human rights, individuals are increasingly calling upon international law for rights protection.

Broadly speaking, this move to look outside the state in search of rights protection follows a Kantian-liberal (1795) model of international relations and rights protection and contemporary scholars such as Michael Doyle (1986;1997) and Martha Nussbaum (1994; 1997). Liberal IR theory, based on Kant's *Perpetual Peace,* offers an explanation based on reason as to how individual rights may be protected within a system of sovereign states. The common goal for both states and individuals is the promotion and maintenance of peace. States and individuals alike may leave a state of war between each other and enter a state of peace. Kantian reason, "makes the [achievement of] the state of peace a direct duty" (Kant, 1795, p.446). Individual reason is transposed upon the state, suggesting that states too are capable of reasoning, and therefore it is understandable that states would place peace among their highest goals.

If states are composed of reasonable individuals, then it is possible that states will approach each other with rationality. Kant (1795) argues that, "a state of peace cannot be established or maintained without a treaty of the nations among themselves." (p.447) The purpose of this union of states is to maintain the freedom of individual states while allying them together in the interest of humanity. Echoing Kant, Michael Doyle (1986) points out that a global state would allow for the possibility of a tyrannical government, therefore state sovereignty must remain intact. The community of nations will continue to grow and interconnectedness will increase to a point where a "violation of law and

human rights in one area of the world will be felt by the entire community of nations" (Kant, 1795, p. 450). Thus, Kant foreshadowed the creation of multinational unions of states, bound by common principles of human rights.

When tracing the transition from a strictly state based rights approach to an international form of rights protection one can see hints of international law as early as the French Revolution and the *Declaration of the Rights of Man and Citizen*. As Hannah Arendt (1994) explained, international human rights became necessary when states themselves began to commit acts of hatred against their own people, causing the state to become a threat to individual rights instead of a protector of rights. Thus, a system in which rights of the individual are protected while maintaining state sovereignty has come to the forefront of international law via conventions such as the ECHR. Considering the case of Ireland, international law presents a potentially quite powerful option for women to pursue individual rights in the face of oppression at the hands of their home government, or, at the very least, publicize their grievances and ensure some condemnation of Ireland's oppressive abortion regime and ensures legal access to information about reproductive rights and guarantees the right to travel to obtain an abortion.

As was previously mentioned, the EU's protection of each individual's freedom to travel and access services and the free movement of services provide an avenue for Irish women to obtain abortions throughout the EU, where this service is permitted. This protection of a woman's right to travel and to access services and information abroad does not however require that Ireland offer abortions on their soil as Protocol 17 explicitly protects Ireland's decision to criminalize abortion on Irish soil. The European

Convention on Human Rights also guarantees all individuals the right to life and therefore, should a state policy violate an individual's right to life, the ECHR may then be applied as a means of protecting the individual against their own state's actions or inactions.

The ECHR also allows individuals to bring cases before the court, but only if all domestic remedies have been exhausted. When considering the role of international law and the notion of abortion as a service on Ireland's abortion related laws, the case of *A, B and C v. Ireland* is particularly relevant. As was noted in chapter three, this case refers to three women who obtained abortions in the U.K. because they were prohibited from doing so in Ireland.

The three complainants in *A, B and C v. Ireland* were drawing upon the following international laws in their case: Article 2 (right to life, particularly of the women in question) and Article 3 (prohibition of inhuman and or degrading treatment), and Article 8 (right to respect for family and private life) of the European Convention on Human Rights, arguing that the Irish national law on abortion was not sufficiently clear and precise, since the Constitutional term "unborn" was vague and the criminal prohibition on abortion was open to different interpretations. Furthermore, *A, B and C* argued that:

> The fact that women – provided they had sufficient resources – could travel outside Ireland to have an abortion defeated the aim of the restriction and the fact that abortion was available in Ireland only in very limited circumstances was disproportionate and excessive. Furthermore, the restriction placed an excessive burden on the applicants as women, in breach of Article 14 (prohibition of discrimination), and particularly on the first applicant, whose financial means were extremely limited (*A, B and C v, Ireland*, 2010).

Prior to *A, B and C v. Ireland*, international law had not been used to challenge Ireland's restrictive abortion laws (with the exception of *D v. Ireland* which was not heard before the ECHR because D had not yet exhausted all domestic legal options) as in most cases it could be argued that by the time a case was heard in an international court it would be a moot issue, as pregnancy contains inherent time limitations.

Although the Irish legislature has been warned previously that s.40 (3) (3) required further specification (recall Justice McCarthy's statement in particular), as of December 2012 they had not offered a clear outline of the limitations of the right to life of the unborn. The ECHR ruled on *A, B and C v. Ireland* on December 16, 2010 stating that

> [The Court] concludes that there has been no violation of Article 8 of the Convention as regards the first and second applicants. The third applicant's complaint concerns the failure by the Irish State to implement Article 40.3.3 of the Constitution by legislation and, notably, to introduce a procedure by which she could have established whether she qualified for a lawful abortion in Ireland on grounds of the risk to her life of her pregnancy (*A, B and C v. Ireland*, 2010).

What the Court was referring to above was the fact that although S. 40. 3.3 guarantees the right to life of a fetus, after the ruling on the *X* Case, it was established that abortion is legal under Irish law in certain cases, namely if a woman's life is in imminent danger as a result of the pregnancy. After careful consideration of the facts of the case, particularly that applicant "C" believed that her cancer would return if she continued her pregnancy, and also that she could not receive cancer treatment while pregnant in Ireland, the Court ruled that with regard to applicant "C," Ireland had violated article 8. More specifically the Court wrote:

> In such circumstances, the Court rejects the Government's argument that the third applicant failed to exhaust domestic remedies. It also concludes that the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution. Accordingly, the Court finds that there has been a violation of Article 8 of the Convention (A, B and C v, Ireland, 2010, at 267-268).

In contrast to the Court's ruling in *A, B and C. V. Ireland*, it is interesting to note that in a similar instance, a pregnant woman suffering from life threatening cancer received a substantial settlement from the Irish state to compensate for the fact that she had to travel to Britain to obtain an abortion.

In 2010, Michelle Harte suffered from a life threatening cancer, one which was worsened by her pregnancy according to doctors at the Cork University Medical Hospital. Although her OB/GYN was willing to perform the abortion, he was "hamstrung" by legal issues (Cullen, 2012b). Ms. Harte then appealed to the Irish state to allow her to obtain a legal abortion on the grounds that her life was at risk as a result of the pregnancy. The Irish state refused Ms. Harte's claim that she required an abortion. As she explains, "I couldn't believe the decision [to refuse an abortion in Ireland] when it came…Apparently my life wasn't at immediate risk. It just seemed absolutely ridiculous" (Cullen, 2012b).

After the Irish state's rejection of Harte's request for a legal abortion, she had no choice other than to travel to Britain and pay for a private abortion. Following her abortion, Harte's lawyer, Michael Boylan, sued the Irish state, "on her behalf for infringing her rights under the *A, B and C* case, in which the European Court of Human

Rights ruled that Ireland had breached the human rights of a woman with cancer who had to travel abroad to get an abortion"(Cullen, 2012b). Boylan filed Harte's lawsuit in May of 2011 and shortly thereafter, in June of 2011, Harte received a substantial settlement from the Irish government. The fact that Harte received a settlement from Ireland is indicative of the fact that abortion laws are on the cusp of change as the state can no longer remain silent on when a legal abortion to save a woman's life may be permitted. This is also a direct example of how international law and decisions by an international body have resulted in direct and immediate change in the position of the Irish state

In March of 2012, at a meeting of the UN Human Rights Council, Spain, the U.K., Norway, Denmark, the Netherlands and Slovenia called for legislation which would force Ireland to implement the Court's ruling in *A, B and C v. Ireland* and provide the procedural background for legal abortions in cases of incest, rape or when a woman's life is in danger as a result of pregnancy (IFPA, "Time for Clarity", 2012). A month later, in April 2012, the Irish Family Planning Association (IFPA) raised its concern after it emerged – through a parliamentary question published in April that the Minister for Health, James O'Reilly, confirmed that:

> In spite of the 2010 ruling by the European Court of Human Rights - the situation of women with life-threatening pregnancies remains the same as before the ruling. As such, women cannot access life-saving abortion services in Ireland and are required to travel abroad. No interim measures to deal with this critical situation have been developed since the Court ruling (IFPA, "Time for Clarity", 2012).

As was outlined in chapter three, in November of 2012 an expert group, chaired by Mr. Justice Sean Ryan drafted a proposal which was presented to the Irish government as a means of clarifying when and how a woman may legally obtain an abortion in

Ireland (IFPA, "Government Under Pressure, 2012). This report prompted the Irish government to declare that they would begin a process of creating regulations as well as legislation outlining when a woman whose life is at risk due to a pregnancy, may legally obtain an abortion. In January of 2014, the *Protection of Life During Pregnancy Act* was officially passed into law in Ireland, allowing for legal abortions where it can be proven that a woman's life is in danger as a result of pregnancy. In order to meet this requirement, a pregnant woman's life must be in danger as a result of the pregnancy, either physically or as a result of the treat of suicide. Where the threat of suicide is presented, three physicians must agree that the woman is indeed suicidal (*Protection of Life During Pregnancy Act*, 2013). In this sense, there are many parallels with Quebec's former TACs, as well as another EU member: Poland.

Poland: An Interesting Comparator

In many ways, Poland presents a useful comparator for an analysis of reproductive rights in Quebec and Ireland, as it shares some of the same characteristics. This is especially the case in regard to Ireland, as each country has an influential and conservative Roman Catholic Church as a major socio-political actor, is nationalistic, and as each country shares membership in the European Union. More specifically, although both Poland and Ireland are members of the EU, each has also found ways via Protocol 30 in Poland and Protocol 17 in Ireland to exempt themselves from the potential liberalization of abortion laws.

Ultimately the use of the Polish case study provides an opportunity to examine how individual women in another similarly situated country to Ireland have utilized the

European legal system. The results, while important, fail to establish a specific right to obtain an abortion (the ECHR and the ECJ both lack this mandate) and thus do not establish a binding precedent on Ireland to amend its strict regulations on abortion. These decisions do, however, illustrate a liberalizing push on the part of European institutions to advance women's reproductive autonomy that may pressure, though not compel, Irish law-makers.

Poland was a late-comer to the EU, joining in 2004 (following a referendum the year earlier), along with nine other countries in the single largest expansion of the EU in terms of member countries. Much like the situation in Ireland, where there is an ongoing debate as to the applicability of EU laws to domestic legislation (particular as it relates to abortion), the strict regulation of abortion in Poland, and the EU's impact upon it, clouded the country's entrance into the EU (Traynor, 2003). For example, in the lead-up to the 2003 referendum, the Catholic Church pressured EU representatives to ensure that "…no EU treaties or annexes to those treaties would hamper the Polish government in regulating moral issues or those concerning the protection of human life," though these exemptions were not provided to lawmakers in Poland, as they historically had been to lawmakers in Ireland (cited in the Guardian, 2003). Much like Ireland, the Polish government has actively tried to exempt itself from the EU's jurisdiction in regard to abortion access.

Despite not receiving these exemptions as a condition of their membership in the EU, Poland still has one of the most restrictive regulatory regimes governing abortion in Europe. Ironically Polish law does not provide for a penalty to women who are able to procure an illegal termination of their pregnancy (though strict penalties are in place for

those who perform illegal abortions or persuade women to obtain an illegal abortion). As such, there is a strong market for illegal abortions, as well as considerable flow of women travelling to neighbouring Czech Republic, where abortion is legally allowed within the first 12 weeks of pregnancy, and within the first 24 weeks of pregnancy with supporting medical documentation, at a relatively affordable cost. In many respects, this parallels the cross-border flow of Irish women seeking legal abortions in England.

Access to abortion in Poland was made much more difficult after the fall of communism in 1993, and is presently regulated by the *Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act*, which permits abortion in only three circumstances: when a woman's life or health is endangered by the continuation of the pregnancy, when there is reason to believe that the pregnancy is the result of a criminal act (such as rape), and when the fetus is serious malformed (Centre for Reproductive Rights, n.d.). This is very similar to Ireland's allowance of abortions.

The prevailing law was briefly liberalized between 1996 and 1997, and made consistent with the law that existed between 1956 and 1993, and permitted abortion in the event of a woman experiencing "difficult living conditions," though this amendment was quickly repealed by conservative forces within the country. While abortion is legally permitted in these three situations, obtaining an abortion remains difficult, as an increasing number of cases illustrate. Women still require certification from a physician to verify a risk to their life or health, or serious malformation of a fetus, whereas certification is required from a prosecutor to obtain an abortion that is necessitated by a pregnancy caused by a criminal act. Increasingly, however, this certification is difficult to obtain (reproductiverights.org). Much like Ireland, there is a major distinction between

what is legally permissible, even as narrow as it is, and what is realized in practice. In practice, abortion is all but permitted, despite being legal only in certain circumstances.

Aided by Poland's entry into the EU, there is a growing body of litigation surrounding cases in which women who have been denied access to reproductive health more generally (and, in many cases, access to abortion in particular), and have utilized supranational bodies such as the ECHR to advance their claims. Much like the Irish example, a combination of conservative law makers and medical professionals have greatly restricted (and in some cases outright denied) women basic reproductive health rights that are guaranteed at the national level, thus forcing women to appeal to a higher body in an effort to ensure that national law makers are living up to their own laws. In short, the EU laws (and courts) have placed liberalizing pressure on both countries' strict conservative abortion policies, though their rulings neither mandate a right to an abortion nor establish precedent within Ireland.

Poland's entry into the EU has provided Polish women with an additional body of laws in the form of EU conventions. Poland is also a member of the Council of Europe which is connected to the European Convention on Human Rights, which advances Polish women's legal struggle to obtain safe and legal abortion access in their home country. Three main cases, *Tysiac v. Poland (2007), R.R. v. Poland (2011),* and *P and S v. Poland (2012)*, have all advanced women's access to reproductive health, including abortions (though have fallen short of mandating an explicit right to abortion), largely as a result of the impact of the European Convention on Human Rights on Polish lawmakers. Importantly, there are also important parallels between these cases and Irish cases, suggesting a slow but present liberalization of abortion laws across Europe.

The first such case, *Tysiac v. Poland (2007)*, involved a visually impaired woman (Alicja Tysiac) who became pregnant in early 2000. After initially discovering that she was pregnant, she consulted with numerous doctors who concluded that she would face the likelihood of significant risk to her eyesight should she carry the fetus to term, though they refused to issue a certificate authorizing her to obtain an abortion (The International Centre for the Legal Protection of Human Rights, n.d.).

Two months into the pregnancy, when her eyesight began to deteriorate significantly, she was finally able to secure a certificate to legally terminate the pregnancy on medical grounds, though the gynecologist scheduled to perform it refused. There was nothing in place that would have allowed Tysiac to appeal the doctors' refusal to perform the abortion, and eventually, it became too late to terminate the pregnancy, and Tysiac was left with no choice but to carry the fetus to term. As predicted, her eyesight continued to deteriorate due to hemorrhages in her retina, she cannot see more than 1.5 metres away, and she required daily assistance and faced the risk of permanent blindness (Centre for Reproductive Rights, 2008).

In 2005, Tysiac launched a claim with the European Court of Human Rights claiming that her Article 3 (protection against torture, inhuman or degrading treatment) and Article 8 (right to private life) rights under the European Convention on Human Rights had been violated as a result of the Polish state's failure to provide her with a medically necessary abortion. In March 2007, the ECHR accepted part of her claim, ruling that her Article 8 right to a private life had been violated, asserting that "…the government's failure to establish an effective procedure through which the applicant could have appealed here doctors' refusal to grant her a request for an abortion"

represented a failure on the part of the Polish government to fulfill its positive obligation under Article 8 (Centre for Reproductive Rights, 2008).

While the ECHR did not rule that she had a right to necessarily obtain an abortion, they did describe the components of a meaningful appeals process for women like Tysiac to challenge a refusal to provide an abortion, and awarded her nearly 40,000 euros for pain and suffering and legal fees. The clarification around the necessity of meaningful appeals process has important implications for Ireland, where many women who may meet the narrow criteria are denied. This would suggest that the ECHR could find Ireland guilty of violating the rights of many Irish women who may experience similar circumstances in their efforts to obtain a legal abortion.

In February, 2002, R.R., a married woman with two children, was 18 weeks pregnant when she had an ultrasound scan, following which she was told by her doctor that he could not rule out the possibility that the fetus was malformed. She told him she wished to have an abortion if his suspicion proved true. Two further scans confirmed that her fetus was most-likely malformed and her doctor recommended that she have an amniocentesis to fully determine the nature of the suspected malformation. A serious malformation of the fetus (along with a danger to the mother's health and a pregnancy caused by rape) is one of three reasons, in theory at least, that a woman can legally obtain an abortion in Poland. On at least seven occasions, she was denied access to necessary medical procedures (either an amniocentesis to confirm the suspect diagnosis of malformation or an abortion to terminate the malformed fetus) for no apparent legal reason except their own conscientious objections, and faced some harassment in the process.

In early April, 2002 she received the results of the genetic tests which confirmed that her fetus had Turner syndrome. She renewed her request for an abortion the same day, but the doctors in this final hospital refused because the legal time limit for abortion had, by this point, passed, regardless of having a legally valid reason for obtaining one (Netherlands Institute of Human Rights, 2011). In July, 2002, R.R. gave birth to a girl with Turner syndrome, and her husband left her shortly after the baby was born.

Nine years later, in 2011, the ECHR handed out a landmark decision in *R.R. v. Poland (2011)*, in which they found Poland to be in violation of R.R.'s Article 3 and Article 8 rights. Most notably, the ruling in R.R. represented a number of "firsts" for the ECHR. It was the first case in which the ECHR found there to be an Article 3 (freedom from inhumane and degrading treatment) violation in a case related to abortion, it was also the first time in which any international human rights body has made a direct ruling on a woman's access to prenatal examinations as they relate to abortions, and finally, it was the first time that the ECHR has recognized that EU member states "have an obligation under the [European] Convention [of Human Rights] to regulate the exercise of conscientious objection in order to guarantee patients access to lawful reproductive health services" (Centre for Reproductive Rights, 2012b). The ECHR also awarded 60,000 euros to R.R. for non-pecuniary damages and legal fees.

The ruling in *R.R.* built on, and expanded the ruling in *Tysiac*, which simply, yet importantly, found that there needed to be an appeal process for women to appeal their doctors' refusal to grant a request for an abortion. In *R.R.*, however, the ECHR went at least one step further, ruling that EU member states have positive obligation to ensure that lawful abortion is accessible in practice by four ways: providing pregnant women

the means to establish their right of access to a lawful abortion, ensuring access to diagnostic services and full disclosure of all relevant information on their pregnancy (even if this information will provide a pregnant woman legal access to an abortion), ensuring that conscientious objections by medical professions do not impede access to legal medical procedures (such as abortion), and formulating provision to regulate the availability of abortion that alleviate the chilling effect on doctors that the existing legal regulations had (Centre for Reproductive Rights, 2012b). The decision in this case had significant impacts on Ireland, notably by stating the above four criteria that women in EU member states should have access to. While stopping short of mandating a positive right to abortion in all circumstances, the ruling meant that a clear framework needed to be in place in EU member states for women who seek to have (and are potentially denied) access to an abortion.

Roughly a year later, the issue of access to abortion in Poland was once again put before the ECHR, following another case in which access to a legal abortion was delayed by medical professionals (and aided by the state, the police, and the Church). In *P. and S. v. Poland (2012)*, a 14-year-old girl (P.) was raped and became pregnant. P. (and her mother, S.) obtained a certificate from a public prosecutor in May 2008 after confirming reasonable suspicion of becoming pregnant through rape, one of the grounds in which abortions are permitted in Poland. Subsequently, she went to two hospitals in her hometown, both of which refused to perform the abortion, despite P. having the prosecutor's certificate (Centre for Reproductive Rights, n.d.). While at the hospital, however, one doctor brought P. to see a Roman Catholic priest, who tried to convince her

to not have an abortion, and the hospital proceeded to issue a press release about the case, causing P. and S. to become the targets of anti-abortion activists.

P. and S. then travelled to Warsaw, where additional doctors refused to perform an abortion. They were then taken into custody by police, S. was accused of trying to force P. to have an abortion (a criminal offense in Poland), and P. was then taken from her mother and place in juvenile shelter. After a complaint from her mother to the Polish Ministry of Health, P. was given back to S., and given permission to obtain an abortion (which she ultimately did). Shortly thereafter, a legal challenge to the ECHR was launched, with P. and S. alleging that their Article 3, Article 5 (right to liberty) and Article 8 rights had been violated.

Building on the precedent set in *Tysiac* and *R.R.*, the ECHR ultimately found Poland to be in violation of P's Article 3, 5 and 8 rights, and S's Article 8 rights. In so doing, the ECHR made six important statements regarding the responsibilities of EU member states (such as Ireland) under the European Convention of Human Rights, including: member states must respect adolescents' personal autonomy in the sphere of reproductive health; abuse and humiliation of adolescents within the reproductive health sector amounts to inhuman and degrading treatment; member states must adequately regulate the practice of conscientious objection to ensure the availability of legal abortion services and information; member states must protect personal information in the health care field and patients' privacy regarding their sexual life; and member states cannot deprive adolescents of their liberty unless all less drastic measures have been considered (Centre for Reproductive Rights, n.d.). It should be noted that these rights are not directly

a result of EU membership, but rather Ireland and Poland's involvement with multiple European institutions.

Most importantly, however, at least for the purposes of advancing access to abortion, the ECHR asserted that women who are legally entitled to abortion must be able to exercise that right in practice by virtue of having effective access to the procedure, stating specifically that "effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, is directly relevant for the exercise of personal autonomy" (European Court of Human Rights, 2008: para 111). The ECHR's determination that a specific mandate that abortion must be available for women who are eligible for it (regardless of the limitations on who is eligible and under which circumstances) was important to abortion rights activists in Ireland, as there have been many instances in which Irish women have not had the procedure available for them, despite experiencing a circumstance which would seem to qualify for one. The ECHR also order Poland to pay upward of 61,000 euros to P. and her mother for damages and legal fees.

Roughly two weeks after the verdict was issued in *P. and S.*, the ECHR once again ruled on an issue involving reproductive rights in a case involving the miscarriage of a fetus, followed shortly thereafter by the untimely death of her pregnant mother. The legal challenge was launched posthumously by Z, the mother of deceased pregnant woman. In *Z. v. Poland (2012)*, however, unlike *Tysiac*, *R.R.*, and *P. and S.*, the Commission failed to find that the Polish state had violated the rights of Z's daughter and in so doing, appears to have changed the slow but sure course of liberalization of Polish reproductive law through a series legal challenges.

This case began in early 2004, when an unnamed pregnant woman in her second trimester was diagnosed with ulcerative colitis, a serious colon condition. After the diagnosis, she sought medical attention, but claims that repeated doctors turned her away and refused treatment and alleges that doctors were more concerned with the potential of harming her fetus than treating her colitis (Centre for Reproductive Rights, 2012a). By September 2004, the woman has miscarried, and within a few weeks she herself died due to complications with her illness. At no time was she actively she actively seeking an abortion, but was merely seeking medical treatment to address her colitis, and alleges that treatment was refused.

Four years later, a lawsuit against the Polish state was initiated by Z, the deceased woman's mother. Though obviously not related to the denial of an abortion, the case presented major implications for Poland's conservative regime of reproductive rights, as it alleged that the medical care that Z's daughter received jeopardized her own care in favour of the care of the fetus, and violated her ECHR rights to life, freedom from inhumane and degrading treatment, and to non-discrimination, as well as claimed that Poland needed to regulate conscientious objection in healthcare to "…ensure that the Polish government guarantee an adequate number of healthcare workers who are willing to provide all legal services and that parties receive timely referrals to these workers (Centre for Reproductive Rights, 2012a).

Despite what appeared to be a trend toward liberalization since *Tysiac*, along with two others (*R.R.* and *P. and S.*), in which the ECHR had ruled that the (in)actions of the Polish government had violated the European Convention on Human Rights, most notably the right to be free from inhumane and degrading treatment (Article 3) and the

right to respect for private life (Article 8), the ECHR failed to rule against the Polish government in *Z. v. Poland*, finding that in this case it did not violate any of Z's deceased daughter's rights under the Convention.

The Court declared that many of Z's allegations were inadmissible due to a dispute of the facts between Z and the Polish government. Ultimately, the government alleged that Z's daughter had been given appropriate treatment, and disputed claims that medical care was denied for religious or personal reasons, and there was not enough evidence to contradict these claims (European Court of Human Rights, 2012). The verdict came as a disappointed to many in Europe's pro-choice social movements, especially in light of what appeared to be a recent trend toward liberalization in cases brought to the ECHR from Poland.

The general liberalizing trend coming from the ECHR certainly bodes well for reproductive rights advocates in Ireland. This case does nothing to advance their goals, but at the same time, does not significantly hamper it, especially in light of the strong and effective precedent from the previous three cases The ruling was made not as a result of the Court ruling that a human rights violation did not occur, but rather, that the ruling was made because the case was "manifestly ill-founded" because Z "failed to submit precise data to substantiate her allegation that her daughter had been discriminated against" (European Court of Human Rights, 2012: para 133-35).

Despite being disappointed with the overall findings, the Centre for Reproductive Rights, a pan-European pro-choice organization was pleased that Court's declaration that "… claims inadmissible based on disputed facts rather than on human rights principles will not be detrimental to future cases on reproductive rights in Poland or elsewhere"

(Centre for Reproductive Rights, 2012a). This suggests that the legal battle over reproductive rights more generally, and access to safe and legal abortions in particular, throughout the EU, and especially in its most conservative member-states, will continue to be an ongoing issue

Despite the important liberalizing decisions from Polish cases noted above, there are still important institutional barriers to liberalization for both countries, particularly Ireland, where it has sought to exempt itself from certain elements of European law, especially as it relates to abortion access. While providing some sense of justice to specific women whose rights were found to be violated, there still remain important limitations of the influence of EU law on member countries who hold restrictive laws on reproductive rights. By creating Protocol 17 in Ireland and Protocol 30 in Poland, each country has been able to successfully protect their restrictive and archaic policies toward abortion.

These cases are also linked by the fact that although both countries allow abortion in incredibly limited circumstances, the actual act of receiving a legal abortion is nearly impossible. Thus, for both Polish as well as Irish women the reality is that they must travel and fund abortions where they are required. Considering these cases, nationalism serves to prohibit abortion in one's own Country, subsequently exporting the service of abortion elsewhere.

Interestingly, we can compare this to Quebec where abortion is legally permitted and paid for in one's own province. However, if a woman from Quebec wishes to obtain an abortion outside of her province, she will not be reimbursed for the procedure (Coalition for Choice, 2010). Here it would seem that nationalism once again affects

abortion, albeit in a very different way. Where Polish and Irish women have no legal option but to travel abroad to obtain abortions, in Quebec, women can obtain this procedure locally.

While the EU and other European international organizations can certainly place moral and legitimizing pressures on Ireland (and Poland), these institutions cannot legally enforce a right to or against legal abortion. This was reinforced in 2008 and 2009 when Ireland was faced with the decision to reject or ratify the *Treaty of Lisbon* (which would further centralize the European Union government) (Calt, 2010). When first presented with the *Treaty of Lisbon*, Irish voters rejected the treaty, in part due to fears that "The continuing growth of a more centralized European Government was seen by some as a threat to Ireland's abortion laws" (Calt, 2010, p. 1203). As Shannon Calt explains, "Attempting to assuage those fears, 'the Irish Government secured a legal guarantee that nothing in the Lisbon Treaty…affects in any way the scope and applicability of the protection of the right to life…'"(2010, p. 1203; Ireland, White Paper, 2009). The Irish Government also ensured voters that the Lisbon Treaty would maintain the guarantees protected by Protocol 17 of the *Maastricht Treaty*. On October 2, 2009, with 67% of the popular vote, the Irish referendum on the Treaty of Lisbon was passed (Calt, 2010).

It should be noted that both Poland and Ireland maintained formal protection of their domestic policies on abortion via Protocols to the *Lisbon Treaty*. Poland joined onto the Protocol 30 (first initiated by the UK) which states that:

> The Charter does not affect in any way the right of member states to legislate in the sphere of public morality, family law, as well as the, protection of human dignity and respect for human physical and moral dignity (Lisbon Treaty, 2007).

Similarly, Protocol 35 states that:

> Nothing in the Treaties, or in the Treaty establishing the European Atomic Energy Community, 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 (Lisbon Treaty, 2007).

The significance of both Protocol 30 and 35 is that Poland and Ireland made official provisions suggesting that while they agreed to the part of the EU.They were in some ways not part of the Charter of Fundamental Rights included in the *Treaty of Lisbon*, suggesting an important limitation to the power and influence of progressive decisions from the ECHR, such as those in recent cases in Poland. While welcomed by abortion rights advocates, these bodies fall short of mandating any changes on Irish law and do not in any way formally compel Irish law-makers (though they may put some degree of popular pressure on them) to make changes.

Conclusion

In summation, for liberals within Ireland as well as the EU, the hopes that EU membership, and membership in other transnational bodies may bring new optimism for Irish women seeking greater reproductive autonomy has fallen short and possibly to this point failed, at least as far as direct access to safe and legal abortions within Ireland for women facing medical emergencies. In this sense, the incremental institutional change in Ireland has yet to bring about the transformative results that pro-choice observers had hoped for (Streeck and Thelen, 2005, p. 9). 42 of 47 Council of Europe member states allow for legal abortions where a woman's health is at risk. All EU member states, with the exception of Malta, provide for legal abortions in some instances. Nonetheless Ireland continues to limit the necessary legislation which would provide for such services (BBC

News, 2007). The UN, as well as CEDAW, has condemned Ireland for its archaic and restrictive policies on reproductive rights, yet Ireland continues to limit access to abortion. Protocol's 17 and 35 explicitly protects Ireland's restrictive laws on reproduction from EU law, preventing any form of liberalization from outside of Ireland's borders.

Ireland's decision to finally make plans to legislate on the 1992 *X* case came as a direct result of the ECHR's ruling in *A, B and C v. Ireland*, illustrating that international pressure can indeed impact domestic policies. Coupled with the tragic death of Savita Halappanavar in the fall of 2012, it would seem that change has finally begun to take shape in Ireland, albeit at the hands of international pressure.[16]

When considering the case of Ireland, it is not solely Irish nationalism, strong Catholic values or public opinion which has led to its continued rejection of legal abortions. These factors come into play in the way in which they shape the political opportunities and points of access in each of the jurisdictions. But perhaps equally important, it seems that what has perpetuated Ireland's restriction of reproductive rights is not actually a variable that is present in Ireland, but instead are three variables that have long been missing: authoritative agents who were willing to advocate for abortions in Ireland, the necessary political and legal structures necessary for reproductive rights change and an increasing amount of pressure from the international community.

While Irish feminists and interest groups have lobbied for greater access to information and even abortions abroad, there has been a surprisingly underwhelming

[16] In fact, as of July 20, 2013 Ireland passed into law that abortion is permitted in certain circumstances if a woman's life is in direct danger as a result of the pregnancy. Two medical doctors must agree that the woman's life is indeed in danger and in the case of the threat of suicide three physicians must agree (Chu, 2013).

push for legal abortion in Ireland itself. This is especially true when considering a relatively forceful push for access to legal abortion in Quebec. Perhaps this push by Irish feminists for access to travel and information, as compared to direct abortion access in Quebec can be at least in part attributed to question of geography. While women from Quebec had no choice but to obtain an abortion (illegally) in Quebec, or travel a great distance and cost overseas (prior to *Roe v. Wade, 1973*, and even then to the United States), Irish women, albeit those with the financial means necessary, had the option to travel to Britain for the procedure. Where women from Quebec were left with very limited options prior to the 1970s, Irish women could in some instances travel to receive an abortion. Thus, the focus of the Irish women's movement became legally securing a woman's right to travel and obtain abortion related information. In this way, they acted to use opportunities where they presented themselves, and created new windows of opportunity despite the constraints of the political and social structures.

A historical absence of pressure from the international community has also helped to restrict access to abortion in Ireland. As has been illustrated recently, this has slowly begun to change. What we have seen recently in Ireland, since the case *A, B and C v. Ireland* in 2010 is an international community and court (ECHR) that are no longer able to sit by and allow Ireland to continue to prohibit abortions in all instances. When Ireland decided that it would allow for abortions in specific circumstances in 1992, following the *X* Case, it opened the door for future legal challenges, such as those that took place in 2010, and further cases that are likely to be heard unless legislative changes occur within Ireland. As the Special Committee on *A, B and C v. Ireland's* report released in 2012 indicated, now, twenty years after the *X* Case, Ireland has finally been forced to

create opportunities for legal abortions within its borders. This change however was fostered as a result of pressure from the international community.

The significance of multilevel governance in Ireland corresponds directly with its membership in European transnational organizations, including the EU and the Council of Europe. Consequently it has been intergovernmental institutions such as the ECJ and ECHR which have provided opportunities for Irish women to advance abortion access. This is especially true as Ireland is a conservative outlier in a multilevel governance structure that is comparatively liberal. In addition to looking outside of Irish borders for access to abortion in other jurisdictions, the Irish pro-choice movement has also looked outside of Irish borders to secure increased access to abortion within Ireland, albeit with limited success.

In Quebec, there is no multilevel governance structure equivalent to that of the EU or the Council of Europe, which has obviously had the effect of negating opportunities for multilevel governance to have an impact on abortion policy, and as such forced Quebec's pro-choice movement to look for internal solutions. While Canada, like Ireland, is a member of the UN, it's comparatively liberal abortion policy has likewise negated whatever limited impact the UN could have on advancing legalized abortion access in Quebec, whereas it has been used, albeit to a limited degree and with limited success, in Ireland.

A common element to both reproductive rights case studies is the fact that simply legalizing abortion does not equate with universal access. In Quebec, abortion has been de-criminalized since 1988, yet today, in 2015 there are many women who struggle to access abortions based on geography or as a result of associated financial barriers.

Similarly in Ireland, although abortion is legal in incredibly rare instances, most women continue to have no option but to travel abroad to obtain an abortion, once again placing an undue burden upon women living in rural areas and women who do not have the necessary resources to pay for an abortion (and its associated costs). Ultimately, the question at hand is one of basic human rights, which are being denied to women seeking abortions in both cases. In Ireland, it would seem that the way toward greater reproductive rights may come as a direct result of multilevel governance and international law.

Chapter 10- Conclusion

> "Another truism of abortion in Ireland…is the contradiction and hypocrisy of public condemnation, but private acceptance" (Dr. Mary Favier, Doctors for Choice, 2008, as cited in Mollman, 2010).

The truth of this statement lies in the fact that as we have observed, although abortion remains incredibly difficult to legally obtain in Ireland, Irish women continue to have abortions. It is the efforts and hardship these women must face which remains most problematic today.

Similarly, in response to the Canadian federal Parliament's decision to debate M-12 (which would have effectively re-opened the abortion question) in April 2012, one woman protesting outside of the building held up a placard with an incredibly true and powerful message: "I can't believe it but I still have to protest this" (Castle, 2012). The truth of this statement lies in the fact that for women today in Quebec, Ireland and in several other states across the globe, abortion access is neither available to all women, nor is the right to reproductive choice secure. Where reproductive choice exists, access is often limited, and its legality remains under constant threat.

Considering the case studies at hand, not only do women in Ireland have to "protest this," as they do in Quebec where there are no legal restrictions on abortion, they also have no choice but to go a step further and to travel to the U.K., at their own personal expense, should they wish to obtain a legal abortion. Although following the 1992 *X Case* it was made clear that abortion would be permitted in some instances, particularly where a woman's life was in immediate danger, over twenty years later laws are just begging to change, albeit in an incredibly slow and conservative manner.

As a woman living in Hamilton, Canada - a densely populated city in Southern Ontario and a regional hub for medical facilities - it is difficult to imagine living in an era or a geographical location in which abortion simply is not available. For a woman living in the Hamilton/Toronto area, safe, free, and legal abortion can be obtained, without a physician's requisition until 15 weeks gestation at a local hospital and up to 22 weeks gestation at a private clinic nearby (Hamilton Health Sciences, 2013). If we compare this with the experience of a woman living in Ireland, who must either prove to a panel of physicians, including two psychiatrists that she is indeed suicidal as a result of her pregnancy or make arrangements to travel to the U.K. (or elsewhere) to obtain an abortion, incurring travel costs as well as the expense paid for the procedure and the associated time delay and social stigma, the differences seem astounding.

I began this dissertation by asking the question: how is it that two jurisdictions, with so many variables in common, can have such drastically different policies toward legalized abortion access? On the one hand, I looked to Ireland and its complete criminalization of abortion, and the other hand, I looked at the absence of criminal regulation of abortion (and often easy access, especially in urban centres) in Quebec. Ireland's conservative and highly regulated stance seems quite peculiar and troubling considering the fact that in most western, democratic states abortion is permitted in at least some instances.

When initially brainstorming potential explanatory variables for Ireland's conservative stance, I considered first whether a unique form of Irish nationalism caused its rejection of legal abortion. Alongside nationalism, I also pondered if Catholicism and the impact of elites and interest groups could explain their position on abortion.

Interestingly, these two variables are also present in Quebec, suggesting that they are unlikely explanations for the divergent policies. It became clear neither Catholicism nor nationalism alone could explain Ireland's continued refusal to liberalize abortion laws and Quebec's relatively long history of liberalized view on abortion. However, these factors do play a role in shaping the overall social and political circumstances within which actors seek to influence and change policy. As these forces change, it may also bring new opportunities for policy changes.

Although the Catholic Church has historically had, and continues to have a significant influence in Ireland, in recent years there has been an increasingly individualized movement causing people to question traditional Catholic values and adopt more modern liberal values as Ireland slowly becomes more secularized. As the experience of the Quiet Revolution illustrated in Quebec, with economic and social liberalization comes some degree of religious liberalization with citizens attending formal religious institutions less frequently. As citizens increasingly draw less of their knowledge and influences from religious authorities this opens the door to other possibilities such as gaining information from media sources as well as peers in the larger community

While Ireland continues to hold strong nationalist values, many of which are contradictory to the goals of the feminist movement, this does not suggest that Irish nationalism has completely prohibited Irish feminists from challenging abortion practices. Although Irish feminists have not been able to align themselves with a larger nationalist project, as was done during the Quiet Revolution in Quebec during a period of liberalization and progress, they have forged ahead in spite of Irish nationalism.

Rather than directly challenge Ireland's abortion laws, Irish feminists have chosen to use opportunities where they presented themselves, and have sought to secure rights to travel and education for women seeking abortions abroad. While this goal is problematic in that it does not create a right to abortion in Ireland, it has successfully secured rights to travel freely to obtain an abortion, a right which did not previously exist in Ireland. In light of the lack of opportunities for policy change in Ireland and the continued presence of institutions that are unwilling to liberalize laws (despite being mandated to do so), this course of action is needed and important, and reflects the context dependent strategies used by the Irish pro-choice movement. The impact of a third variable, multi-level governance, has provided the Irish pro-choice movement with some liberalizing options in terms of access to travel in the EU, as well as the EU and ECHR pressuring the Irish government to liberalize its laws.

This dissertation also considered Irish public opinion itself, via the opinions of individuals, interest groups and the women's movement more broadly speaking. From this, I found that Irish public opinion is increasingly in favour (84% according to Collins, 2013) of legalized abortion in Ireland in at least some circumstances. Thus, it cannot be argued that abortion is simply an 'un-Irish' practice. As the public outcry following both the *X* Case as well as the death of Savita Halappanavar illustrate, the Irish public is growing increasingly frustrated with their government's refusal to legislate for safe, legal abortion, especially in cases in which an abortion is medically necessary and a continuation of the pregnancy threatens (or in some cases ultimate takes) the life of a woman. Over the next year it may very well be that Ireland is finally forced to rectify its promise made in 1992 to legislate on abortion.

I also considered the impact of the competing institutional strategies afforded to the pro-choice movement in both Ireland and Quebec. The federal division of powers in Canada with respect to health care and the administration of justice provided the opportunity structure for a women's movement in conjunction with with a sympathetic governing party to bring about a change in policy on access to abortion services, although the *Canadian Criminal Code* prohibited abortion. In Quebec, for example, the pro-choice movement was strongly aligned with the nationalist and pro-choice Parti Quebecois, who eventually refused to prosecute Henry Morgentaler. The actions of the feminist movement in Quebec, as well as the inaction of the PQ illustrate the ways that a policy can change in the absence of formal legal change. The entrenchment of the *Charter of Rights and Freedoms*, provided a new access point which was used by pro-choice forces to advance a woman's right to liberty and security of the person over a fetus' right to life, resulting in a change in law. Thus, as the case of abortion access in Quebec illustrates, policy change and legal change can occur at different times and in fact policy change can precede legal change.

The presence of a more liberal political climate and change much earlier on, especially in the 1960s with the Quiet Revolution, helped to put Quebec on a more liberal path earlier on than Ireland, which in turn impacted later opportunities for liberalization. While not for a lack of effort, the Irish pro-choice movement has been hampered by a lack of political opportunities and institutional structures to liberalize abortion policy.

The two central themes which run throughout this dissertation were the conflict between the rights of women and of potential fetuses and the role that both agents and structures play in the larger reproductive rights debate. With regard to the former, it

seems that only in the wake of *A, B and C v. Ireland* as well as Halappanavar's death is Ireland finally starting to take the rights of pregnant women seriously. While the women's movement was able to secure a right to reproductive education and travel this only affords women the ability to seek abortions elsewhere, it does not remedy their right to reproductive choice in Ireland.

When considering the level of influence of agents or institutions in both Ireland and Quebec on the reproductive rights movement, it seems as though both have been effective in unique ways, with the latter influencing the choices and strategies of the former. While the current domestic legal structures surrounding abortion laws have failed to clarify if and when abortion is permissible in Ireland, international bodies such as the ECHR have proven quite useful to the Irish women's movement. This action before the ECHR would not have been possible without the efforts of the Irish women's movement itself, thereby illustrating that agents have also been quite powerful.

What has been and continues to be missing from the Irish case, that was present in Quebec's reproductive rights movement, is the presence of authoritative agents who champion for abortion access in Ireland. Where in Quebec, Dr. Morgentaler became a figurehead for the reproductive rights movement, in Ireland no such figure exist.

With regard to the position and strength of the Irish women's movement, I found that considering Ireland's institutions features, such as strict anti-abortion laws and severe punishment for those who were found to have performed or assisted in performing an abortion, members of the women's movement were forced to find unique strategies to forge ahead in their journey for greater reproductive rights. From as early as 1970 and the condom trains that travelled to Northern Ireland to purchase illegal contraceptives, to the

innovative interest group Women on the Waves who operate in the water just off Ireland's coast, Irish women have often sought answers to issues of reproductive rights outside their borders, and often outside of calls for safe and legal abortions. While this may have facilitated access to sexual freedom (condoms), knowledge, information, and access to abortion abroad, it has not fundamentally altered Irish laws, particularly those that regulate access to abortion itself.

As a member of the EU and the Council of Europe, Irish women now have an increasing number of opportunities under European laws and conventions to challenge Ireland's criminalization of abortion. As *A, B and C v. Ireland* illustrated, the ECHR now offers an avenue for women to directly challenge Ireland's abortions laws and in many ways has forced Ireland to take a hard look at its current laws. This increased access to and of the legal system represents an important opportunity for the Irish pro-choice movement (Tarrow, 2004, p. 77). Directly resulting from the ECHR's ruling in *A, B and C v. Ireland*, the Irish Expert Group on A, B and C was forced to finally decide how Ireland would proceed with regard to creating the necessary avenues for women to obtain legal abortions in Ireland. Ireland has yet to implement specific laws outlining abortion at this time the matter is currently under debate by various parties in Ireland.

As this dissertation has illustrated, over the past twenty to thirty years Irish opinions on abortion have gradually become more liberal, however, this has not equated with liberalization of Ireland's highly restrictive laws surrounding women's reproductive freedom, nor does it come close to mirroring the level of legalization found in Quebec. It is only marginally easier for an Irish woman wishing to obtain an abortion to access one in 2015 than it was in 1992 following the highly publicized *X Case*. Despite considerable

public discourse, Ireland's further integration into the European community, women's increased participation in the public sphere, some degree of secularization, and the public outcry of the fourteen-year-old rape victim X and the death of Savita Halappanavar, accessing safe and legal abortion in Ireland remains a near impossibility (as was illustrated by the case of Miss Y in August of 2014).

As a feminist and a scholar, I am now left with many looming questions. In the face of international pressure, will Ireland finally clarify and ultimately liberalize its abortion laws? Although laws may eventually become less restrictive, will this equate with greater access for Irish women, via the creation of abortion clinics? On a global scale, what can feminists do to combat the growing attack on reproductive rights, particularly those seen in jurisdictions with already liberalized laws, such as Quebec? Finally, will a woman's right to control her own reproduction ever be safe? The final question applies both to women in Ireland and women in Quebec.

What is most perplexing when considering the reproductive laws in Ireland is that the ban on abortion does not mean that Irish women do not require and do not obtain abortions. In fact, it is estimated that in 2012, 3 982 Irish women travelled to the U.K. for abortions (Minihan, 2013). As Niall Behan, president of the Irish Family Planning Association (IFPA) explains, "The ban on lawful abortion services in Ireland does not deter women from having abortions; it places the burden of accessing this necessary health service on women" (as cited in, Minihan, 2013). In the face of an Irish government who has historically been unwilling to consider legalizing abortion domestically, Irish feminists have chosen to focus their efforts toward the international community.

On one hand, at present it seems as though the Irish women's movement's use of international law via *A, B and C v. Ireland* has proven successful in forcing Ireland to re-consider the nature of its abortion laws as is illustrated by the special committee who considered this case in December of 2012. On the other hand, however, the re-surfacing of the abortion debate in Ireland has caused a great deal of political turmoil with no clear solution in sight. This begs the largely theoretical, yet practically relevant question: what is the relationship between theory and practice considering the nature of reproductive rights?

While in theory Ireland has been considering decreasing restrictions on abortion since 1992, and at present allows for abortion under special circumstances under the *Protection of Life During Pregnancy Act (2013)*, this does not mean that abortions are widely available to Irish women. Comparatively, in Quebec, with no official law that criminalizes abortion at any point during a woman's pregnancy, abortions are legal in theory. In practice, however it is incredibly difficult for some women to obtain the procedure. In light of these two examples, we may ask ourselves what is the best way to secure a right to abortion, through the creation of law or absence of it?

With the creation of laws comes the possibility for restrictions (such as those currently witnessed in the United States, and in particular in Texas) on abortion (Khazan, 2014; Ludden, 2015). However, the absence of law also leaves room for attacks against women's reproductive freedom from those who continually wish to create laws prohibiting abortion (as it experienced in the Canadian context with M-12). In light of this predicament how should Ireland, and other states, proceed when attempting to create a space where women's reproductive rights are secure?

When considering avenues for future research on this topic, a potential first step may be to examine other instances where the women's movement has looked to both domestic and international law in order to advance reproductive rights. In doing so it may be possible to uncover which avenues are most successful in the journey toward securing abortion access.

The existence of abortion tourism, as is evidenced in Ireland via the U.K. and in Quebec (and other Canadian provinces) where women may have no other option than to travel elsewhere in Canada, also provides a potential direction for future research. As the Quebec case illustrates, although abortion may not be criminalized in a state, this does not equate with access for all women. It may prove quiet interesting to conduct a study of the specific hardships experienced by women who must travel for abortions with the goal in mind of suggesting potential solutions to the lack of access.

Until abortion and reproductive rights services are available to all women who require them, the pursuit of free, safe and legal abortions will never be finished.

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Appendix 1: History of reproductive rights in Ireland

1861 *Offences Against the Person Act*: Criminalises the procurement of a miscarriage as well as the act of assisting in the procurement of a miscarriage. This *Act* remains the basis of Irish criminal law on abortion.[17]

September 1983: Referendum on the Eighth Amendment of the Constitution is passed after a contested campaign. 53.67% of the electorate voted with 841 233 votes in favour and 416 136 against. Article 40.3.3 of the Constitution is amended to read: "*The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.*"

June 1985: The Society for the Protection of the Unborn Child (SPUC) initiate High Court proceedings against Open Door Counselling and Dublin Well Woman. SPUC seeks an injunction preventing the organisations from giving women information on abortion services legally available outside of Ireland.

September 1985: The Attorney General joins SPUC in the case against Dublin Well Woman Centre and Open Door Counselling. SPUC applies to the High Court to prevent student groups from sharing leaflets with contact information of abortion service providers in England. The High Court refers certain questions to the European Court of Justice before delivering a judgement.

December 1989: SPUC appeals to the Supreme Court to overturn the decision of the High Court to seek clarification from the European Court of Justice before issuing an injunction. The Supreme Court finds that the activities of the student groups in relation to the provision of information on abortion services is unlawful and issues an injunction preventing their activities. The European Court of Justice is still to make a ruling.

October 1991: The European Court of Justice rules in *SPUC v Grogan* that abortion could constitute a service under the Treaty of Rome (Treaty of the European Economic Community). Member States cannot prohibit the distribution of information by agencies having a commercial relationship with foreign abortion clinics. However, the Court also rules that since the student groups had no direct links with abortion services outside of Ireland, they could not claim protection of European Community law.

December 1991: The Irish government negotiates Protocol 17 to the *Maastricht Treaty* that seeks to protect the constitutional prohibition on abortion from any change that might be required as a result of EU membership. An Irish referendum on the *Maastricht Treaty* took place in June 1992 with Irish citizens voting in favour of *Maastricht.*.

February 1992: The Supreme Court rules in *Attorney General v X* that a 14 year old girl, known as X, pregnant as a result of rape, faces a real and substantial risk to her life due to

[17] Information gathered from the Irish Family Planning Association online, available at: http://www.ifpa.ie/Media-Info/History-of-Sexual-Health-in-Ireland (last accessed, July 20, 2013)

threat of suicide and this threat could only be averted by the termination of her pregnancy. X is entitled to an abortion in Ireland under the provision of article 40 (3)(3) of the Constitution that requires the State to have "due regard to the equal right life of the mother".

October 1992: In the case of *Open Door and Well Woman v Ireland*, the European Court of Human Rights rules that Ireland violated Article 10 of the European Convention on Human Rights guaranteeing freedom of expression. The Court found that the Irish Courts' injunction against Open Door and Well Woman from receiving or imparting information on abortion services legally available in other countries was disproportionate and created a risk to the health of women seeking abortions outside the State.

November 1992: As a result of the *X* case judgement and the issues relating to travelling and information on abortion, Ireland puts forward three possible amendments to the Constitution in a referendum.

1. The freedom to travel outside the State for an abortion - PASSED
2. The freedom to obtain or make available information on abortion services outside the State, subject to conditions - PASSED
3. To roll back the X Case judgement in order to remove suicide as a grounds for abortion in Ireland - REJECTED

November 1997: A 13 year old girl, known as Miss C, is raped and becomes pregnant. The Eastern Health Board takes C into its care and in accordance with the girl's wishes, obtains orders from the District Court to take C abroad for an abortion. C's parents challenge these orders in the High Court case *A and B v Eastern Health Board*. The District Court rules that as Miss C was likely to take her own life if forced to continue with the pregnancy therefore she was entitled to an abortion in Ireland in light of the previous judgement in the 1992 *X* Case.

March 2002: Irish voters reject the Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2002 which would remove threat of suicide as a ground for abortion and increase the penalties for helping a woman have an abortion.

August 2005: Three women living in Ireland lodge their case to the European Court of Human Rights (*A, B & C v Ireland*) challenging Ireland's abortion ban. The complaint alleges breaches of Articles 2 (protection of the right to life), 3 (freedom from inhuman and degrading treatment), 8 (protection of the right to family life) and 14 (protection for equal enjoyment of convention rights) of the Convention.

May 2007: A 17-year-old woman known as Miss D with an anencephalic pregnancy goes to High Court to force the Health Service Executive to allow her to travel to obtain an abortion. The High Court rules that she has a right to travel but does not comment further on her right to abortion.

July 2009: The UN Human Rights Committee criticises Ireland for its restrictive abortion laws and constitutional entrenchment of gender inequality.

December 2009: A, B & C are granted an oral hearing before the 17 Judge Grand Chamber at the European Court of Human Rights. Ireland argues that the women should have gone through the Irish courts.

2010: The ECHR rules on *A, B and C v. Ireland* and finds that indeed C's rights have been violated.

October 2012: October 28, Savita Halappanavar is pronounced dead at the University Hospital in Galaway. Halappanavar lost her life as a result of complications arising from a miscarriage she was experiencing.

November 2012: The Expert Group on the ruling in *A, B and C v. Ireland* releases its report outlining 4 options for the Irish government in reforming its abortion laws.

December 2012: Ireland declares that it will legislate to give effect to the ruling in the 1992 *X case*.

January 1, 2014: The *Protection of Life During Pregnancy Act* is passed into Irish Law

August 2014: Miss Y seeks an abortion but her case is delayed so much that she eventually delivers of a live child at 25 weeks gestation, via caesarian section.

December 2014: It is decided that a young pregnant woman, who has been declared legally brain-dead, is allowed to be removed from life-support. This decision came only after a panel of physicians explained that the fetus would not survive the remainder of its gestational period.

Appendix 2: History of Reproductive Rights in Quebec

1892: Federal Parliament passes Canada's first *Criminal Code* prohibiting abortion as well as the sale, distribution and advertising of contraceptives.[18]

1969: The federal Liberal government under Trudeau decriminalizes contraception and allows abortion under certain circumstances. Abortions may be performed in a hospital if a Therapeutic Abortion Committee (TAC) of doctors decides that continuing the pregnancy may endanger the mother's life or health.

1969: Dr. Henry Morgentaler illegally opens an abortion clinic in Montreal. His clinic is raided by Montreal police in 1970.

May 1970: As part of the abortion caravan, thirty-five women chain themselves to the parliamentary gallery in Ottawa as part of a two-day demonstration for abortion rights.

March 1973: Morgentaler announces he has successfully performed more than 5,000 abortions.

March 1975: Morgentaler begins serving an 18-month jail sentence after the Supreme Court of Canada rejects his appeal. Earlier, a Quebec court had convicted him of conspiracy to commit an abortion. While in jail, Quebec prosecutes Morgentaler on a second count of conspiracy to commit an abortion. Morgentaler is acquitted and the Quebec Court of Appeal does not overturn the verdict.

January 1976: The federal justice minister sets aside Morgentaler's original conviction and orders a retrial. Morgentaler is released from jail after serving 10 months.

November 1976: Quebec's Parti Québécois government drops all outstanding charges against Morgentaler.

1982: The entrenchment of the *Canadian Charter of Rights and Freedoms*.

July 1983: Dr. Morgentaler opens an abortion clinic in Toronto along with Drs Scott and Smoling, shortly after the clinic is raided by police.

Jan. 28, 1988: The Supreme Court of Canada strikes down Canada's abortion law as unconstitutional in *Morgentaler, 1988*. The law is found to violate Section 7 of the Charter of Rights and Freedoms because it infringes upon a woman's right to "life, liberty and security of person."

1989: In *Tremblay v. Daigle*, the Supreme Court rules that a man has no legal right to prohibit a woman from obtaining an abortion

[18] Information gathered in part from, Abortion Rights: Significant Moments in Canadian History, CBC, available at: http://www.cbc.ca/news/canada/story/2009/01/13/f-abortion-timeline.html (last accessed, July 20, 2013)

1989: Nova Scotia bans abortions in clinics outside hospitals.

1990: The federal government introduces Bill C-43, which would sentence doctors to two years in jail for performing abortions where a woman's health is not at risk. The bill is passed by the House of Commons, but dies in the Senate after a tie vote.

1994: New Brunswick bans abortions in clinics outside hospitals.

1995: Provincial and federal rulings force Nova Scotia and New Brunswick to allow private abortion clinics.

June 2006: Introduction and failure of Bill C-338 which if passed would have criminalized abortion after 20 weeks gestation.

November 2007: Bill C- 484 fails to pass into law. Had it passed, the murder of a pregnant woman would have constituted two cases of homicide.

July 2008: Dr. Morgentaler receives the Order of Canada.

May 2009: The New Brunswick Court of Appeal rules that Morgentaler can proceed with a proposed lawsuit against the provincial government, which only pays for abortions that are performed in hospitals and approved by two physicians.

April 2010: Bill C-510 "Roxanne's Law" is proposed (and is later rejected) at the federal level. This would have amended the criminal code to "prohibit coercing a woman into an abortion via physical or financial threats, illegal acts or through argumentative and rancorous badgering or importunity".

September 2012: M-312 called for an inquiry into the possibility that a fetus could be considered a human being under the Criminal Code. This too failed before Parliament.

May 29, 2013: Dr. Morgentaler passes away.

November, 2014: Premier of New Brunswick removes requirement that a panel of two physicians must approve all abortions. Abortions must still be performed in Hospitals only in New Brunswick.