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"Going to England": Irish Abortion Law and the European Community*

By David Cole**

I. INTRODUCTION

From the provincial perspective of United States scholars and practitioners interested in reproductive rights, it seems that the principal point of Mary Ann Glendon's 1987 comparative study of abortion and family law, Abortion and Divorce in Western Law,¹ is to demonstrate that the U.S. Supreme Court's position on abortion was out of the mainstream. In the book, Glendon presents a table that situates the Western nations on a continuum with respect to their legal regulation of abortion.² Standing alone, far to one side, was the United States, reflecting Glendon's contention that in Roe v. Wade,³ the United States went further than any other Western nation in liberalizing access to abortion. Only five years after Glendon's book appeared, the U.S. Supreme Court retreated from Roe v. Wade in its decision in Planned Parenthood v. Casey.⁴ Arguably, in Casey, the Supreme Court began to bring the U.S. position on abortion in line with the positions of other Western nations by permitting abortion in

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¹ This Article is based on a speech presented in March 1993 at the Hastings International & Comparative Law Review's Eleventh Annual Symposium on International Legal Practice, "The European Community in Evolution: Toward a Closer Political & Economic Union."

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1. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987).
2. Id. at 14 (table entitled "Legal Regulation of Abortion in Twenty Countries").
specified circumstances, but simultaneously insisting on the impor-
tance and sanctity of unborn life.5

Upon re-reading Glendon's book for a study of Ireland's abortion
laws, one is equally struck that Ireland also stands virtually alone,
although at the other end of the spectrum. In 1987, when Glendon
published her book, Ireland outlawed abortion altogether, subject
only to the defense of strict necessity. At that time, only Belgium's
abortion laws were as strict as Ireland's abortion laws, while all other
European nations had liberalized their abortion laws considerably.6

Ireland may now also be on the way to bringing its abortion pol-
icy in line with the policies of the majority of Western nations. If this
is the case, then much of the credit (or blame, depending on your
perspective on the matter) must be assigned to Ireland's connections
with the European Community (EC). Ireland has repeatedly tried to
insulate its abortion policy from the pressures of Europe's liberalizing
influence, but it has just as repeatedly found itself ensnared in Euro-
pean oversight. To paraphrase John Donne, Ireland is not an island to
itself, much as it might like to be on the question of abortion.

In some ways, the struggle over abortion in Ireland is a mirror
image of the abortion struggle in the United States. In both countries,
the issue has been so controversial that politicians have, for the most
part, sought to avoid it, with the result that major legal developments
have been sparked by judicial decisions or the fear thereof. But while
the judicial struggle for reproductive rights in the United States has
been driven largely by pro-choice forces, in Ireland this struggle has
been propelled by anti-abortion forces, who have repeatedly pursued
declarations of rights in the courts.

The impetus for the liberalization of abortion laws in Ireland has
come not from its domestic courts, but from European institutions,
international public pressure, and international law. Pro-choice liti-

5. Id. While the Casey Court narrowly rejected an invitation to overrule Roe out-
right, and in fact insisted on the importance of maintaining Roe's protections, it simultane-
ously reinterpreted Roe to permit the states to engage in much more interventionist
measures in the interest of the potential life of the fetus.

6. Until April 4, 1990, Belgium did not permit abortion. During 1990, the Belgian
parliament adopted a law that legalized abortion up to the fourteenth week of pregnancy
when the woman is "suffering distress." King Baudouin refused to sign the law and tempo-
rarily abdicated on April 4, 1990 so that the Belgian Council of Ministers could adopt and
promulgate the law. John Palmer, Belgium: Monarch Abdicates for a Day over Abortion
Issue, GUARDIAN, Apr. 5, 1990, at 20; Belgium: King 'Unable to Rule' Due to New Abortion
Law, AGENCE EUROPE, Apr. 5, 1990, at 5, available in LEXIS, World Library, TXTLNE
File.
gants, often finding themselves defendants in lawsuits brought by anti-
abortion groups, have refused to accept the legitimacy of the Irish
legal system on this matter and have taken their cases to both the
European Court of Human Rights (ECHR) and the European Court
of Justice (ECJ). The decisions of these tribunals, combined with the
political and pragmatic pressures of living side-by-side with nations
that have adopted far more liberal attitudes toward abortion, have es-

tablished the first inroads on Ireland’s strict abortion laws.

This Article will examine the interplay of European and domestic
Irish forces in the struggle for reproductive rights in Ireland from
1983, the year Ireland adopted a constitutional amendment guarantee-
ing the right to life of the unborn, to the present. The story of this
constitutional amendment demonstrates the futility of enforcing moral
isolationism in the European Community. That isolationism is impos-
sible even on an issue as strongly felt as abortion is by the Irish sug-
gests the integrationist force that a supranational human rights regime
can have on domestic legal culture.

II. THE IRISH LEGAL BACKGROUND IN 1983

It should not be surprising that Ireland, an overwhelmingly Cath-
olic country, has long imposed harsh prohibitions on abortion. Since
1861, Irish criminal law has provided that any woman who undergoes
an abortion, or any person who performs an abortion, has committed
a felony and may be punished by life imprisonment, with no excep-
tions. A companion provision makes it a misdemeanor to provide
any instruments or drugs to be used for abortions.

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7. IR. CONST. art. 40.3.3.
8. Under section 58 of the Offences Against the Person Act of 1861:
Every Woman being with Child, who, with Intent to procure her own Miscarriage,
shall unlawfully administer to herself any Poison or other noxious Thing, or shall
unlawfully use any Instrument or other Means whatsoever with the like Intent,
and whosoever, with Intent to procure the Miscarriage of any Woman, whether
she be or be not with Child, shall unlawfully administer to her or cause to be
taken by her any Poison or other noxious Thing, or shall unlawfully use any In-
strument or other Means whatsoever with the like Intent, shall be guilty of a
felony and being convicted thereof shall be liable at the Discretion of the Court to
be kept in Penal Servitude for life.
Offences Against the Person Act, 1861, 24 & 25 Vict. 236, ch. 100, § 58 (Ir.). Theoretically,
the use of the word “unlawfully” might permit some exceptions, JAMES CASEY, CONSTITU-
TIONAL LAW IN IRELAND 345 (1992), but the matter is quite theoretical, as no facilities in
Ireland provide abortions. Kate O’Callaghan, Ireland’s Other Troubles: After Centuries of
Silence and Fear, the Irish Finally Confront the Reality of Abortion, L.A. TIMES, Jan. 3,
1993, at 22.

9. Section 59 of the Offences Against the Person Act of 1861 provides:
In 1979, Ireland enacted the Health (Family Planning) Act, which prohibits the publication or distribution of “any book or periodical publication . . . which advocates or which might reasonably be supposed to advocate the procurement of abortion.” This Act also restates the prohibitions on “the procuring of abortion” and the “sale, importation into the State, manufacture, advertising or display of abortifacients.”

Notwithstanding this strict legal framework, Ireland’s pro-life advocates grew concerned in the late 1960s and 1970s, when other European countries and the United States began to liberalize their respective abortion laws. The liberalization began closest to home, when Great Britain enacted the Abortion Act of 1967, which governed England, Scotland, and Wales. Prior to 1967, Great Britain had the same criminal abortion provisions as Ireland. The 1967 Abortion Act, however, made abortions before viability lawful if two doctors certified that the child would be born with a serious handicap, or that the pregnancy posed a risk to the life or health of the pregnant woman or of any existing children in her family “greater than if the pregnancy were terminated.” Within two decades, virtually all of Europe followed suit, amending previously broad prohibitions in order to allow abortion under specified circumstances.

This state of affairs could have two effects on Ireland’s domestic abortion law, both of which would be anathema to the Irish anti-abortion forces. First, in the short term, Europe’s general liberalization of abortion policy might serve as a safety valve, permitting Ireland’s restrictions to continue in name, while allowing Irish women who could afford to travel abroad to England or to other countries in Europe an escape route by which to obtain abortions. The travel option al-

Whosoever shall unlawfully supply or procure any Poison or other noxious Thing, or any Instrument or Thing whatsoever, knowing that the same is intended to be unlawfully used or employed with Intent to procure the Miscarriage of any Woman, whether she be or not be with Child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to (imprisonment) for any Term not exceeding five Years . . . .

Offenses Against the Person Act, ch. 100, § 59.


11. Id. § 10.


13. GLENDON, supra note 1, at 11.

14. This arrangement meant that Irish women with the greatest access to political power, i.e., upper middle-class women, would not be denied access to abortion. Similarly, in the United States, prior to Roe v. Wade, when some states permitted abortion and others
allowed Irish people (and politicians) to avoid the difficult choices posed by the particular circumstances of women seeking abortions, yet permitted the Irish to retain an abstract commitment to the life of the unborn. While this compromise might have been satisfactory to politicians, it could not be satisfactory to those with strong pro-life convictions.

Second, in the long term, the more Irish women availed themselves of the travel option, the greater the pressure might be to liberalize abortion within Ireland, as Ireland’s legal prohibition would be revealed as merely symbolic. “Abortion tourism” had already had such a liberalizing effect on the rest of Europe, and Ireland’s anti-abortion movement sought to quash abortion tourism before it took hold in the country.

In 1981, in an attempt to forestall this “sea-change”15 from overtaking Ireland, a coalition of Irish anti-abortion groups instituted a campaign for a constitutional amendment recognizing the right to life of the unborn.16 The campaign was extremely divisive,17 but it culminated in a 1983 constitutional amendment, approved by a greater than a two-to-one margin, that guaranteed protection for the right to life of the unborn. This amendment, which became the eighth amendment to the Irish Constitution and is codified as article 40.3.3,18 provides: “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
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its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”

III. THE BEGINNINGS OF CHANGE: 1983-92

From the vantage point of its proponents, Ireland’s eighth amendment was designed to “copperfasten” existing protections for the unborn and to head off changes that might result from judicial reform or political pressures. In fact, the amendment has produced exactly the opposite result. Since 1983, the validity of Ireland’s abortion restrictions has been repeatedly questioned in various legal and political forums. And today, women’s rights to abortion in Ireland, while still extremely constrained, are more liberal than they have ever been.

Like the eighth amendment itself, all of the subsequent developments in Ireland’s abortion laws have arisen from efforts by anti-abortion forces to insulate Ireland from the influence of its European neighbors. Ironically, each attempt to enforce the amendment has re-opened the abortion issue politically and legally, and has led to further inroads on Ireland’s otherwise total prohibition on abortion.

Three legal cases form the outline of the story. Two cases involved attempts by the Society for the Protection of Unborn Children (S.P.U.C.) (Ireland) Ltd., an Irish anti-abortion group, to halt the dissemination of information within Ireland about lawful abortion alternatives abroad. The first of these actions, Attorney General ex rel. Society for the Protection of Unborn Children (S.P.U.C.) (Ireland) Ltd. v. Open Door Counselling and Dublin Well Woman Centre Ltd., eventually reached the ECHR in Open Door and Dublin Well Woman v. Ireland (“Open Door”). The second action, Society for the Protec-

19. Id.
20. “Those seeking the amendment to the constitution asserted that they were seeking only to ‘copperfasten’ the existing law lest any future government might seek to change it.” Robert A. Pearce, The Irish Abortion Controversy, 142 NEW L.J. 283 (Feb. 28, 1992). See also Vicky Randall, The Politics of Abortion in Ireland, in THE NEW POLITICS OF ABORTION 67-69 (Joni Lovenduski & Joyce Outshoorn eds., 1986).
21. Att’y Gen. (S.P.U.C. (Ireland) Ltd.) v. Open Door Counselling and Dublin Well Woman Centre Ltd., 1988 I.R. 593 (Ir. H. Ct.), aff’d in part, rev’d in part, 1988 I.R. 619 (Ir. S.C.). In this case, the plaintiff S.P.U.C. “had originally instituted the proceedings in its own name. On its locus standi to do this being challenged, the Attorney General gave leave for his name to be used in relator proceedings, and the action continued with the Attorney as nominal plaintiff.” CASEY, supra note 8, at 347 n.75.
22. Open Door and Dublin Well Woman v. Ireland, 246 Eur. Ct. H.R. (ser. A) (1992) [hereinafter Open Door]. The abbreviation “Open Door” is used to refer generally to the entire litigation including the action before the ECHR.
tion of Unborn Children (S.P.U.C.) (Ireland) Ltd. v. Grogan ("Grogan"),\textsuperscript{23} was ultimately heard by the ECJ.\textsuperscript{24} The third case, Attorney General v. X and Others ("X"),\textsuperscript{25} filed by the Attorney General, sought to enjoin a fourteen-year-old Irish girl from travelling to England for an abortion. Although this case was resolved within the Irish legal system without recourse to European legal principles, it too had dramatic implications for European-Irish relations.

The story of these cases and the political battles surrounding them are complicated chronologically by the fact that each case has a very different lifeline. The Open Door case, for example, is both the first and the last case in the overall story, because although the case began in the Irish judicial system in June 1985, it was not finally resolved until October 1992, when the ECHR issued its decision. In the intervening years, the Grogan and X cases were decided, and each of these decisions, in turn, had an impact on the subsequent Open Door decision by the ECHR.

A. **Open Door: Closing the Channels to Lawful Abortion**

The fact that abortion has been legal in England since 1967 has meant that many Irish women have escaped the strict dictates of Irish criminal law by obtaining lawful abortions in London clinics. Irish criminal abortion laws do not extend to conduct beyond its borders, and every year thousands of Irish women travel abroad to obtain abortions.\textsuperscript{26} The practice is so well established that the phrase “going


\textsuperscript{25} Att'y Gen. v. X and Others (Ir. H. Ct. 1992), rev'd (Ir. S.C. 1992), reprinted in *The Attorney General v. X and Others: Judgments of the High Court and Supreme Court With Submissions Made by Counsel to the Supreme Court* (Suniiiva McDonagh ed., 1992) [hereinafter McDonagh].

\textsuperscript{26} The estimates vary on precisely how many Irish women travel to Great Britain each year for abortions. One source states that over 35,700 Irish women travelled to Great Britain from 1969 to 1984 to obtain an abortion, and that in each year from 1980 to 1984, over 3,000 women from Ireland obtained an abortion in Great Britain. CHRISTOPHER TIEZZE & STANLEY K. HENSHAW, *INDUCED ABORTION: A WORLD REVIEW 52*, tbl. 3 (Alan Guttmacher Institute ed., 6th ed. 1986). The highest estimate comes from France's Family Planning Movement, which states that 15,000 Irish women make the trip each year for an abortion. Anthony J. Blinken, *Womb for Debate: Europe's Abortion Wars*, New Republic, July 8, 1991, at 12. Most estimates are in the range of 4,000 to 6,000 Irish women travelling abroad annually for abortions. See Edward Pilkington, *More Irish Women Travelling for Abortions*, I. TIMES, July 13, 1992, at 3 (noting that 4,152 Irish women travelled abroad for abortions in 1991, and 4,063 women travelled abroad for abortions in 1990); Abbie Jones, *Irish Court Rules Permission of Teen Rape Victim to Travel for Abortion Heats Up the Issue*, CH. TRIB., Mar. 8, 1992, at 1 (4,000-8,000 Irish women travelling
to England” has become a euphemism in Irish parlance for having an abortion. Nonetheless, only after the 1983 right-to-life referendum did this practice become the focus of law enforcement efforts. Perhaps emboldened by its success in enacting the eighth amendment, the S.P.U.C. decided to target family-planning clinics that had been advising Irish women about the availability of lawful abortions in England. In June 1985, the S.P.U.C. sued two such Dublin-based clinics, Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd., asserting that the clinics’ activities violated the eighth amendment’s right to life of the unborn.

These clinics engaged in “non-directive counselling” on pregnancy matters, which consisted of informing pregnant women of all their legal options, including childbirth, adoption, and obtaining an abortion in another country. As the Irish Supreme Court stated, “non-directive counselling to pregnant women would never involve the actual advising of an abortion as the preferred option but neither, of course, could it permit the giving of advice for any reason . . . against choosing to have an abortion.” If a woman chose to have an abortion, the clinics referred her to an appropriate medical facility in Great Britain, and in some cases assisted her with travel arrangements.

On December 19, 1986, the Irish High Court issued a declaration that the two clinics’ activities violated the eighth amendment to the Irish Constitution because the information they provided assisted in the destruction of the right to life of the unborn. The clinics had argued that the right to life of the unborn should be balanced against the privacy, speech, and associational rights of the clinics and their patients. The High Court, however, concluded that the rights of the clinics and patients were overridden by the “fundamental” right to life of the unborn child: “The qualified right of privacy, the rights of association and freedom of expression and the right to disseminate infor-

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28. While article 40.3.3 appears to refer only to “the State,” Irish constitutional jurisprudence does not include a “state action” doctrine, so constitutional rights operate against private individuals as well as government actors. Brian Wilkinson, Abortion, the Irish Constitution and the EEC, Pub. Law 20, 22 (Spring 1992).


mation cannot be invoked to interfere with such a fundamental right, as the right to life of the unborn."\textsuperscript{31}

The clinics appealed, and on March 16, 1988, the Irish Supreme Court unanimously upheld the High Court's decision.\textsuperscript{32} Like the High Court, the Supreme Court gave short shrift to the clinics' arguments that their rights and the constitutional rights of their clients would be violated by an injunction suppressing information about lawful abortions elsewhere. The Court ruled that "no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child."\textsuperscript{33} Accordingly, the Supreme Court permanently enjoined the clinics

from assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by the making for them of travel arrangements, or by informing them of the identity and location of and the method of communication with a specified clinic or clinics or otherwise.\textsuperscript{34}

From the S.P.U.C.'s standpoint, the Open Door litigation was, at this point, an unmitigated success. The case established that the Irish judiciary had an obligation, equal to that of the executive and legislative branches, to protect the right to life of the unborn. It proclaimed that right as virtually absolute, trumping important constitutional rights of the already living, such as the freedom of expression and privacy. In addition, Open Door laid the foundation for cutting off an important avenue for the liberalization of Ireland's abortion laws, since it prohibited the dissemination of information about the availability of lawful abortions abroad. The Supreme Court's rationale appeared to ban virtually any expression that might offer assistance to a pregnant woman seeking an abortion, and its injunction, particularly given the final words "or otherwise," was potentially limitless.\textsuperscript{35}

The clinics, however, were not willing to accept the Supreme Court's injunction as the final word, and they sought further relief under the European Convention on Human Rights ("Convention"),\textsuperscript{36} to which Ireland is a signatory. As a signatory to the Convention, a nation agrees that the ECHR may adjudicate complaints by private

\textsuperscript{31} Id. at 617.
\textsuperscript{32} S.P.U.C. (Ireland) Ltd. v. Open Door Counselling, 1988 I.R. at 618 (Ir. S C.).
\textsuperscript{33} Id. at 625.
\textsuperscript{34} Id. at 627.
\textsuperscript{35} Id.
individuals concerning the deprivation of human rights, and each signatory nation is obliged to comply with the ECHR's judgments. Although the Irish Supreme Court could bar the communication of information about abortion activities in other signatory nations, thereby insulating Ireland in part from the social and moral pressures of its European neighbors, the Irish Court could not insulate its own order from review by the ECHR.

In September 1988, the clinics, joined by two counselors and potential clients, filed applications with the European Commission on Rights ("Commission"). They argued that the Irish Supreme Court judgment in *Open Door* violated articles 8, 10, and 14 of the Convention, which respectively guarantee the rights to privacy, expression, and equal protection.

The clinics emphasized their free expression claims. There was no dispute that the injunction interfered with their rights to impart and receive information under article 10(1), as it expressly prohibited speech. Indeed, the injunction was a classic prior restraint, and as in U.S. First Amendment jurisprudence, prior restraints are especially disfavored under the Convention. The heart of the dispute focused on whether the restrictions could be justified under article 10(2), which permits restraints on speech where they are "prescribed by law."

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38. *Id.* Under the European Convention on Human Rights, an application must first be filed with the Commission, which rules on the application's "admissibility." If the application is found admissible, the Commission issues a recommendation on the application's merits and strives to resolve the dispute amicably. Only those cases that are referred by the Commission or a signatory nation are heard by the ECHR, whose decisions are, theoretically, binding on the signatories. Thus, while a private party can file an application with the Commission, it has no independent right to seek a review by the ECHR if neither the Commission nor the signatory nation request such review. DONNA GOMIEN, SHORT GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 152 (1991).


40. *Id.* at 55.

41. Article 10(1) of the Convention provides:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.


and "necessary in a democratic society" to further any of a number of specified aims.\textsuperscript{43}

Ireland contended that the injunction was justified to protect the rights of unborn children, to protect morals, and to prevent crime.\textsuperscript{44} Its principal argument, echoing the rationales of the Irish courts, was that the right to life of the unborn child was primary and that "lesser" claims like the rights to expression, privacy, and equal protection could not trump the right to life. Ireland invoked several Convention articles in support of this contention, including article 2, which Ireland interpreted as protecting the right to life of the unborn;\textsuperscript{45} article 17, which bars actions that would destroy the rights and freedoms guaranteed in the Convention;\textsuperscript{46} and article 60, which provides that the Convention will not limit "any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party."\textsuperscript{47} Ireland argued that both the European Convention and the Irish Constitution guaranteed the right to life of the unborn, that the right should prevail over all competing rights except possibly the right to life of the mother, and that therefore its injunction was justified.\textsuperscript{48}

The clinics' principal contention was that the injunction prohibited Irish citizens from speaking about underlying conduct that was

\textsuperscript{43} Id. at 29. See also Open Door, 246 Eur. Ct. H.R. (ser. A) at 55 (Commission Report). Article 10(2) of the Convention provides:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention, supra note 36, at 230.


\textsuperscript{45} Article 2 of the Convention provides that "[e]veryone's right to life shall be protected by law." Convention, supra note 36, at 224.

\textsuperscript{46} Article 17 of the Convention provides:

Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Id. at 234.

\textsuperscript{47} Article 60 of the Convention provides: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party." Id. at 250.

wholly lawful to undertake.\textsuperscript{49} If Irish women could legally travel to England to get an abortion, the clinics asked, what interest could Ireland assert in barring people from providing non-directive information about that activity? Given the central importance of free expression in a democratic society, it could not be "necessary in a democratic society" to bar people from talking about an activity that the democratic society permits.

The clinics also argued that the injunction was not "necessary" because it was wholly ineffective.\textsuperscript{50} The very information Ireland sought to censor—the identity, addresses, and phone numbers of abortion clinics elsewhere—was available to resourceful Irish women from several sources other than the clinics, such as English telephone books, foreign magazines, and London's directory information.\textsuperscript{51} As a result, the clinics argued, it was not at all clear that the injunction accomplished its asserted ends—the saving of fetuses from abortion. On the contrary, statistics suggested that the injunction had caused no diminution in the number of Irish women travelling to Great Britain for abortions.\textsuperscript{52}

Significantly, both of the clinics' principal arguments were predicated on the fact that Europe, and specifically England, had legalized abortion. It was only because Ireland's neighbors had legalized abortion that the clinics could argue that the information sought to be suppressed concerned lawful activity. As long as relatively open channels of communication existed between European nations, there would always be ways to obtain information about lawful abortions abroad. In addition, as long as the borders between nations remained relatively open, women seeking abortions would travel for that purpose. At the same time, neither argument required the Court to rule on whether abortion itself was a protected right under the Convention.\textsuperscript{53}

\textsuperscript{49} Id. at 20-21.
\textsuperscript{50} Id. at 11-12, 26.
\textsuperscript{51} Id. at 18.
\textsuperscript{52} Id. at 11-12.
\textsuperscript{53} The applicants also argued that the injunction violated articles 8 and 14 of the Convention, which guarantee a right to privacy and equal protection, respectively. Id. at 32. An article 8 ruling would have required a determination as to whether abortion is protected by the right to privacy, a determination the Court and Commission were apparently not ready to make, as neither body reached that issue. Id. at 20-21, 32. An equal protection violation under article 14 could be established only by demonstrating unequal treatment with respect to another right separately protected by the Convention. See J.E.S. FAWCETT, APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 295-96 (1987). Moreover, the direct victims of the privacy and equal protection claims were not the clinics, but their patients.
On March 7, 1991, the Commission found that the injunction violated applicants’ rights under article 10 of the Convention. The majority of the Commission rested its report on neither of the applicants’ principal arguments, adopting instead an argument that the injunction was not “prescribed by law,” because it was not reasonably foreseeable that the constitutional amendment would prohibit the non-directive counselling that applicants conducted. The Commission noted that the applicants’ expression was not proscribed by any provision of criminal law, nor did their expression constitute a civil tort. In addition, the Commission noted, article 40.3.3 on its face addressed only the State, not private individuals.

The Commission’s rationale, like a vagueness determination in U.S. courts, avoided the normative issues at stake in the case. Because the Commission found the law insufficiently precise, it did not reach Ireland’s arguments that it had a near-absolute right to protect the right to life of the unborn, or that this right to life is guaranteed by the Convention. Nor did the Commission take a position on applicants’ arguments that Ireland could not proscribe counselling about the availability of lawful abortions in other states. Instead, the Commission merely reasoned that Ireland could not ban counselling under a provision as open-ended and vague as article 40.3.3. Thus, its decision left open the possibility that the injunction could be maintained under a more specific law.

Several concurring members of the Commission concluded that the restriction on speech was invalid because it was not “necessary in a democratic society.” These members relied squarely on the clinics’ principal contentions that Ireland had forbidden discussion about

55. Id. The “prescribed by law” requirement is analogous to the “vagueness” doctrine in American constitutional jurisprudence and serves similar purposes of guaranteeing notice, limiting official discretion, and avoiding the chilling of protected expression. To be “prescribed by law,” the government’s action “must have some basis in domestic law, which itself must be adequately accessible and be formulated with sufficient precision to enable the individual to regulate his conduct, if need be with appropriate advice.” *Barthold v. Germany*, 90 Eur. Ct. H.R. (ser. A) at 21 (1985). The individual must be able “to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.” *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 31. Moreover, while the law may confer a reasonable amount of discretion on government officials, the law must indicate the extent and manner of exercise of this discretion. *Case of Silver*, 61 Eur. Ct. H.R. (ser. A) at 33 (1983). See also *Grayed v. Rockford*, 408 U.S. 104 (1972) (listing similar purposes for vagueness doctrine as applied to restrictions on speech).
57. Id. at 57. But see supra note 28.
legal conduct (in other states) and that the injunction had not diminished the number of abortions in Ireland, but had merely delayed the time when women could obtain abortions, thereby increasing the dangers to women’s health and safety without demonstrably benefiting the unborn. 59

Both the Commission and Ireland sought to have the matter heard by the ECHR. However, before turning to that Court’s decision, we must return to Ireland for two intervening cases.

B. Grogan: Abortion as an Economic Right

Once the S.P.U.C. obtained its injunction against Open Door Counselling and Dublin Well Woman Centre, it sought to extend the principle to other sources of information. The S.P.U.C.’s next targets were student pamphlets that listed the names, addresses, and phone numbers of abortion clinics in England. 60 In Grogan, 61 filed in September 1989, the S.P.U.C. sought to enjoin three student associations from publishing and distributing such information. 62 The defendant student groups argued that the requested injunction would violate the Treaty of Rome, which governs the European Economic Community (EEC). 63 The Treaty of Rome guarantees the right to travel among Member States to receive services, including medical services, 64 and the students maintained that Irish citizens therefore had a right to receive and impart information about medical services that were lawful in another Member State. 65

The Irish High Court, hearing the case in the first instance, decided to refer questions concerning the applicability of EC law to the ECJ. 66 The High Court asked the ECJ to answer three questions: (1)

59. See id. at 72.
62. Id. at 758.
63. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY], tit. III, ch. 2, arts. 59-60.
64. In 1984, the Advocate General of the ECJ determined that under Convention article 59, “the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions ... and that tourists, persons receiving medical treatment, and persons travelling for the purpose of education or business are to be regarded as being recipients of services.” See Joined Cases 286/82 & 26/83, Luisi and Carbone v. Ministero del Tesoro, 1984 E.C.R. 377, 403.
66. Grogan, 1989 I.R. at 758 (Ir. H. Ct.). Under article 177 of the Treaty of Rome, a domestic court may refer questions concerning EC law to the ECJ where it “considers that
Is the provision of abortion a service within the meaning of the Treaty?; (2) Can Member States prohibit the distribution of specific information about the location of and means of communication with abortion clinics in another Member State?; and (3) Does a person in one Member State have a right under Community law to distribute such information? The High Court also declined to grant the S.P.U.C.'s request for an interlocutory injunction pending the outcome of its referral.

The S.P.U.C. appealed to the Irish Supreme Court, which reversed the High Court's refusal to enter an interlocutory injunction. The decision to refer questions to the ECJ was not appealable, however, and therefore the Supreme Court could not reverse that decision. Nonetheless, the Supreme Court left little doubt that it did not think much of the referral. Reiterating its position on the absolute value of the right to life, the Court opined that "where the right sought to be protected is that of a life, there can be no question of a possible or putative right which might exist in European law as a corollary to the right to travel so as to avail of services." In his separate opinion, Judge Walsh insisted that whatever happened, the Irish Supreme Court would have the final word:

Any answer to the reference received from the Court of Justice of the European Communities will have to be considered in the light of our own constitutional provisions. In the last analysis only this Court can decide finally what are the effects of the interaction of the eighth amendment of the Constitution and the third amendment of the Constitution.

While the Court did not directly refute the established principle that Community law takes precedence over all national law, including constitutional and fundamental rights, it came very close to doing so, reflecting once again Irish sensitivity to European pressure on the abortion issue.

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69. Id. at 765.
70. Id. at 768-69. The third amendment to the Irish Constitution governs Ireland's relationship with the EEC and the European Coal and Steel Community, and provides that laws, acts, or measures adopted by these Communities have the force of law in Ireland. Ir. Const. art. 29.4.3.
For its part, the ECJ, perhaps concerned about a showdown with the Irish judiciary, went out of its way to avoid deciding the issue. It recognized that abortion is a service within the meaning of the Treaty of Rome, but held that the student groups lacked standing to raise the claim that the requested injunction would interfere with their rights because they lacked an economic relationship with the English providers of abortion services. Exercising the "passive virtues," the ECJ did not then need to decide whether barring the provision of information about lawful services in a Member State violated the Treaty.

While many have criticized the ECJ's opinion, the alternative might well have been worse from the standpoint of reproductive rights advocates. The Advocate General, who makes recommendations to the ECJ much as the Commission makes reports to the ECHR, had determined that the questions were properly raised, but then concluded on the merits that Ireland's informational ban was justified. Under the Treaty of Rome, the free movement of services may be restricted for objectively justified public policy imperatives. The Advocate General found that Ireland must be granted a wide margin of discretion in determining what is necessary to meet its constitutional policy of protecting the right to life of the unborn. He determined that while other restrictions, such as "a ban on pregnant women going abroad" for abortions, would not be justified, the restriction on information was the least restrictive means available to Ireland to further its public policy objective. He did not consider

75. Case 205/84, Commission v. Federal Republic of Germany, 11 E.C.R. 3755, 3808 (1986), 2 C.M.L.R. 69, 102 (1987); Case 36/75, Rutili v. Minister for the Interior, 9 E.C.R. 1219, 1231 (1975), 1 C.M.L.R. 140, 155 (1976) ("genuine and sufficiently serious threat to public policy" required to justify derogation). The source for this principle is article 56 of the Treaty of Rome, which provides: "The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."
77. Id. at 567.
whether providing counter-information and counselling would be a less restrictive alternative.

The Advocate General then considered whether the restriction on abortion information was consistent with article 10 of the European Convention on Human Rights.\textsuperscript{78} He reasoned that where the ECJ reviews a national rule within the scope of EEC law, it must consider the rule in light of the Community's human rights principles, which are guided by such sources as the European Convention on Human Rights.\textsuperscript{79} The Advocate General concluded that the ban interfered with the students' rights under article 10, but found that interference justified because of the wide margin of discretion that must be afforded Ireland on this fundamental moral issue.\textsuperscript{80}

The Advocate General's opinion, while reaching the same result as the ECJ, did so by reasoning that would have been much more damaging to the cause of reproductive rights advocates. Still, even the Advocate General's opinion insisted on the interplay between European rights and Irish national law, and held that some restrictions on Irish women would be impermissible, including a ban on travel abroad to seek an abortion.

While the ECJ and the Advocate General both declined to overturn Ireland's informational ban, the ECJ did so on grounds that raised as many questions as it resolved. By declining to adopt the Advocate General's view, the ECJ left open the distinct possibility that in a case presenting the requisite economic ties, it might reach a different result. Moreover, in concluding that abortion was a service covered by the Treaty of Rome, the ECJ, like the European Commission on Human Rights, served notice that Ireland's treatment of access to abortion was not simply a matter of Irish law. Europe's pressures on Ireland continued.

C. The X Case: Abortion as a Right to Life

The third chapter in the story of Ireland's right-to-life amendment takes place within Ireland proper, but again the issue concerns the interrelationship between Ireland and its neighbors. This time the action was instituted not by the S.P.U.C., but by the Irish government. In fact, it is extremely unlikely that the S.P.U.C. would have brought

\textsuperscript{78} Id. at 570-73.
\textsuperscript{79} Id. at 570.
\textsuperscript{80} Id. at 574.
the case, for the action was certain to backfire politically. The govern-
ment’s reason for bringing the action remains a mystery.

The case arose when a fourteen-year-old girl, to be known pub-
licly forevermore only as X, discovered she was pregnant after being
raped by her friend’s father.\textsuperscript{81} She and her parents decided to go to
England for an abortion. However, before leaving, her parents called
the Irish prosecutors to see whether a DNA test should be done on
the fetus to determine the identity of the father for evidence in the
rape case.\textsuperscript{82} The prosecutors made some inquiries within the office
and concluded that such evidence would be inadmissible.\textsuperscript{83} The next
day, X and her parents travelled to England to make arrangements for
the abortion. The same day, the Attorney General applied \textit{ex parte}
for an injunction, pursuant to the eighth amendment to the Irish Con-
stitution, barring the girl from getting an abortion.\textsuperscript{84}

The High Court granted the injunction after an expedited \textit{in cam-
era} hearing.\textsuperscript{85} The Court reasoned that unless there was an immediate
and inevitable risk to the life of the mother, the right to life of the
unborn child had to take precedence, because an abortion necessarily
terminates the life of the fetus.\textsuperscript{86} While the Court acknowledged that
X faced a real risk of suicide, “the risk that the defendant may take
her own life if an order is made is much less and of a different order of
magnitude than the certainty that the life of the unborn will be termi-
nated if the order is not made.”\textsuperscript{87}

The High Court also considered X’s arguments that EC law guar-
anteed a right to travel to Member States to receive abortion serv-
ices.\textsuperscript{88} The Court acknowledged that its order would infringe that
right, but determined that the infringement would be justified by pub-
lic policy.\textsuperscript{89} Like the Advocate General in \textit{Grogan}, the High Court
reasoned that Ireland must be granted broad discretion in how it en-
forces its citizens’ moral judgment about protecting the right to life of
the unborn child. But while the Advocate General read EC law to
prohibit a travel restriction, the High Court found the discretion

\begin{itemize}
  \item \textsuperscript{81} Att’y Gen. v. X and Others, \textit{reprinted in} McDonagh, \textit{supra} note 25, at 9.
  \item \textsuperscript{82} \textit{Id.} at 9-10.
  \item \textsuperscript{83} \textit{Id.} at 10.
  \item \textsuperscript{84} \textit{Id.} at 9-12.
  \item \textsuperscript{85} \textit{Id.} at 9.
  \item \textsuperscript{86} \textit{Id.} at 14.
  \item \textsuperscript{87} \textit{Id.}
  \item \textsuperscript{88} \textit{Id.} at 15.
  \item \textsuperscript{89} \textit{Id.} at 15-19.
\end{itemize}
broad enough to permit such a restriction. The Court noted that the European Convention on Human Rights afforded broad discretion to Member States on moral matters, and that there was nothing explicit in EC law that prohibited derogations from Treaty rights "arising because of deeply held convictions on moral issues." Moreover, the Court noted, granting wide discretion to Member States would further the EC's development by allowing for moral differences rather than "imposing a spurious and divisive uniformity on its members."

The High Court advanced no affirmative moral or normative argument under Community law for restricting X's travel. Instead, it simply insisted that Ireland ought to have wide latitude in violating EC rights when moral issues were at stake—latitude so broad that no affirmative argument was needed. The Court's only argument was directed not toward establishing the morality of the restriction, but rather toward demonstrating the importance of respecting a Member State's moral judgments, whatever they may be. This argument, however, cuts both ways. Respect for the moral commitments of Member States could just as easily be construed to bar one Member State from seeking to extend its moral restrictions to another Member State with a different set of moral convictions.

The High Court's argument ironically resembles an argument some reproductive rights advocates make to the opposite end: namely, that because abortion is a fundamental moral issue about which reasonable people disagree, the state should not enforce any particular resolution of the issue on its citizenry. The High Court employed

90. Id. at 18.
91. Id.
92. Id.
94. In Planned Parenthood v. Casey, 112 S. Ct. at 2806-07, for example, the U.S. Supreme Court justified a right to reproductive choice in these terms:

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest . . . .
this argument to ward off the imposition of EC values on Ireland, but the very same argument can be used against the imposition of the Irish majority's values on its citizens.

The High Court's decision sparked massive protests. The notion that Ireland would enjoin a fourteen-year-old rape victim from travelling to another country to obtain a lawful abortion there shocked both the Irish people and the international community and brought unwanted attention to the issue of Ireland's relations with its neighbors at a time when Ireland's place in the EC was being reexamined.

Within ten days, the Irish Supreme Court reversed the injunction. The Supreme Court's rationale carefully avoided virtually all of the controversial aspects of the case. It did not render a decision on

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At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

95. "The young women demonstrators who scuffled with police outside the Irish parliament this week waved banners saying 'Get your rosaries off our ovaries'... The plight of the 14 year old rape victim... has produced a dramatic backlash against Ireland's strict anti-abortion laws, to the point where a growing number of Irish politicians may be ready to countenance legalising abortion in certain circumstances." Tim Coone, *An English Solution to an Irish Problem*, FIN. TIMES (London), Feb. 28, 1992, § 1, at 2; see also *Girl Cleared to Travel for Abortion*, FACTS ON FILE WORLD NEWS Dig., Feb. 27, 1992, at 134, D2 ("[t]here had been almost daily protests in Dublin against the court's injunction").

The strong public response apparently caused the government to rethink its position, at least behind closed doors. According to the *Washington Post*, "[i]nformed sources in Dublin said the government put enormous pressure—public and private—on the five justices [of the Supreme Court] to overturn the ruling, warning that the case was tearing Ireland apart and embarrassing the country overseas." Glenn Frankel, *Irish Supreme Court Allows Teenager to Seek Abortion*, WASH. Post, Feb. 27, 1992, at A27. The government did not change its legal position before the Supreme Court, however, and argued there for affirmance of the High Court injunction.

96. Jon O'Brien of the Irish Family Planning Association on February 17, 1992, condemned the injunction: "The state appears more concerned with protecting the procreative rights of rapists than with protecting the rights of their victims." See *Girl Cleared to Travel for Abortion*, supra note 95, at 134. Irish President Mary Robinson stated: "We are experiencing as a people a very deep crisis in ourselves... We must move on to a more compassionate society." Jones, supra note 26, at 1. An editorial in the *Irish Times* asked: "What has been done to this Irish Republic, what sort of state has it become that in 1992 its full panoply of authority, its police, its law officers, its courts are mobilised to condemn a fourteen-year-old child to the ordeal of pregnancy and childbirth after rape at the hands of a 'depraved and evil man.'" *Descent into Nightmare and Cruelty; How an Irish Times Editorial Reacted to the Court Ban on Abortion for a 14-Year-Old Rape Victim*, GUARDIAN, Feb. 19, 1992, at 19. *The Irish Independent* branded the case a tragedy of our times. Chris Parkin, *Irish Papers Slam Rape Victim Abortion Ban*, PRESS ASS'N NEWSFILE, Feb. 18, 1992, available in LEXIS, Nexis Library, PANEWS File.

97. Att’y Gen. v. X and Others, reprinted in McDonagh, supra note 25, at 47.
the propriety of barring women from travelling abroad for abortions. It did not address the EC law issues that such an injunction would necessarily raise. Instead, the Court decided the case as if X were seeking an abortion within Ireland. It held that abortion is permissible where there is a real and substantial threat to the life of the mother that can be avoided only through abortion. X had threatened to commit suicide if she were forced to bear the child, and the Court found this a real and substantial threat to her life. At the same time, however, the Court stressed that a threat to the mother's mental or physical health, as distinct from a threat to her life, would not justify an abortion.

The X decision resolved what had become an internationally watched crisis in the only way possible—by allowing X to have an abortion. But neither the anti-abortion nor the pro-choice forces were pleased with the decision. The pro-life contingent was outraged that the Court had for the first time authorized abortion within Ireland. Pro-choice forces were equally troubled by the Court's suggestion that in other circumstances women could be restrained from travelling outside Ireland to obtain a lawful abortion.

While the X litigation formally ended at the Irish Supreme Court, it had repercussions both for Ireland's relations with the EEC and for the Open Door case, which at the time of the X decision was still waiting to be argued before the ECHR. In both contexts, the X decision required the Irish government to retreat from earlier absolutist positions regarding its authority to prohibit activities relating to abortion.

98. Three of the five Justices (Finlay, C.J., Hederman, J., and Egan, J.) stated in dicta that under Irish constitutional law, Ireland could restrain a woman's travel in appropriate circumstances in order to vindicate the right to life of the unborn. Att'y Gen. v. X and Others, reprinted in McDonagh, supra note 25, at 64 (Finlay, J.); id. at 102 (Egan, J.); id. at 80-81 (Hederman, J.). See also CASEY, supra note 8, at 348. The Justices reasoned that where the constitutional right to life of the unborn conflicts with the constitutional right to travel, the former must prevail. However, none of the Justices expressed an opinion as to whether such an injunction on travel would be permissible under the Treaty of Rome.

99. Att'y Gen. v. X and Others, reprinted in McDonagh, supra note 25, at 60. Chief Justice Finlay justified this test in part by emphasizing the wide range of relational interests that are implicated in considering the life of the mother. He stated that the Court must "concern itself with the position of the mother within a family group, with persons on whom she is dependent, with, in other instances, persons who are dependent upon her and her interactions with other citizens and members of society in the areas in which her activities occur." Id.

100. Id. at 61-62.

101. Id. at 60.

102. CASEY, supra note 8, at 348-49.
When the X action first arose, Ireland was in the midst of seeking its citizens' approval of the Treaty on European Union (Maastricht Treaty), which was designed to promote an economic, monetary, and political union among European nations. During the negotiation of that treaty, Ireland sought to insulate its abortion laws from liberalizing European influences and to separate the economic decision to remain in the EEC from the moral issue of abortion. To this end, the Irish government secured a special protocol, protocol 17, which provided that nothing in the EEC Treaties "shall affect the application in Ireland of article 40.3.3 of the Constitution of Ireland." When X was decided, however, the Irish government's strategy backfired, and the Maastricht Treaty and its special protocol became a flashpoint for abortion politics. Those pro-choice and anti-abortion advocates dissatisfied with the X decision were concerned that adopting protocol 17 would effectively freeze the unhappy status quo. Moreover, public reaction against the government's position in X had made it clear that the public did not favor restricting a woman's right to travel abroad for an abortion. In Ireland, the Maastricht Treaty, which promised substantial economic benefits for Ireland, had to be approved by a majority of voters in a public referendum. Concerned that the abortion issue would cause the Maastricht Treaty to be rejected, the government assured the populace that it would introduce a separate referendum to permit women to travel abroad for abortions and to obtain information about abortions abroad. At the same time, the Irish government added to protocol 17 a "solemn declaration" stating that the intention of the protocol's drafters was "not [to] limit freedom either to travel between Member States or, in accordance with conditions which may be laid down, in conformity with Community law, by Irish legislation, to obtain or make available in Ireland, information relating to services lawfully available in Member States." Thus, the X case caused the government to execute a 180-degree reversal of its position on abortion in the Maastricht Treaty. The case

103. Treaty on European Union [Maastricht Treaty].
104. Maastricht Treaty, protocol 17 [Regarding Ireland]. See also Casey, supra note 8, at 352; Ireland: Battle of Maastricht, Economist, Feb. 29, 1992, at 55.
106. Ireland; Make O'Break, Economist, June 13, 1992, at 56.
108. Maastricht Treaty, protocol 17 [Regarding Ireland], quoted in Casey, supra note 8, at 352-53.
effectively transformed a government initiative to immunize Ireland’s restrictive abortion laws from European influence into a reluctant agreement to liberalize Ireland’s abortion laws by guaranteeing access to Europe in exchange for its own citizens’ approval of a European treaty. The Treaty was approved, and a referendum on abortion was scheduled for November. In the meantime, the ECHR finally issued its decision in the case that began this story, Open Door.

D. Open Door Revisited

The implications of the X decision for the ongoing Open Door litigation were technically narrow but conceptually significant. Once the Irish Supreme Court had ruled that abortion was lawful in certain circumstances, Ireland could no longer defend the full scope of the Open Door injunction. At oral argument before the ECHR, Ireland’s attorneys conceded that at least where women were entitled under Irish law to have an abortion, they would also be entitled to information about abortion clinics. In one sense this was a narrow concession, for an injunction so limited would still bar the vast majority of women from receiving such information. But the concession was conceptually significant because it undercut the absolutist position that Ireland had to that point advanced. Ireland’s argument—successful in both the High Court and the Supreme Court—rested on the absolute primacy of the right to life of the unborn. The X case demonstrated that even within Irish domestic law, such primacy was not absolute.

While the ECHR noted Ireland’s X-based concession, it did not limit its decision to that narrow ground, but invalidated the injunction in its entirety. Nor did the Court adopt the Commission’s tactic of declaring the restriction too vague and sidestepping the difficult question whether a more carefully drafted prohibition would pass muster. Instead, the Court addressed the issue on its merits and held that the injunction was not “necessary in a democratic society” to further Ireland’s legitimate purposes.


111. Id. at 17. Although abortion is now legal in Ireland in certain instances, no hospitals or doctors perform abortions in Ireland, so women seeking abortions must still leave the country to obtain an abortion. See O’Callaghan, supra note 8.


113. Id.
The Court accepted that Ireland had a legitimate aim in adopting the injunction, because protection of the unborn child was predicated on the Irish community's profound moral values concerning the nature of life, as reflected in the 1983 referendum. The Court also acknowledged that, in general, it affords Member States a wide margin of discretion on questions involving the protection of morals within their respective communities. Nonetheless, the Court insisted that this margin of discretion was not absolute and was ultimately subject to the Court's oversight. Applying that oversight, the Court found that the injunction was not justified because Ireland allowed thousands of women to travel abroad to obtain abortions, had conceded that a bar on abortion information to all pregnant women was not justified, and had not disputed that resourceful women could get this information in other ways. The effect of the restriction appeared to be not so much to protect the unborn as to relegate women to less healthy and safe sources for obtaining information about abortion clinics.

Like the clinics' arguments, the Court's rationale was predicated in large part on the existence of lawful abortion in other Community states and the relative openness of communication between Member States. The Court's reasons turned more on the practical effect of the existence of other freedoms than on the moral or normative imperative of allowing free information. In one sense, the Court engaged in bootstrapping, inasmuch as it justified the affirmance of a human right to information by pointing to the inevitable pressures created by the availability of abortion in other Member States. But, in another sense, the Court's analysis was more than bootstrapping, for the Court gave formal legal recognition to the right of free exchange of information across borders within the EC, even where that free exchange threatened a Member State's moral commitments.

The timing of the Court's decision was quite bold. When Ireland announced that it would hold a constitutional referendum on, among other things, the right to information about lawful abortion services in other countries, it appeared likely that the ECHR would await the results of that referendum before issuing its decision. But the Court issued its ruling on October 29, 1992, less than one month before the referendum.\textsuperscript{114}

\textsuperscript{114} The Court may have seen this as an opportunity to strengthen its symbolic authority on human rights matters. By deciding the matter before the Irish referendum was voted upon, the Court "allowed" Ireland a convenient opportunity to comply with its decision. The Court had reason to be concerned about Ireland's willingness to comply with its deci-
In other respects, the ECHR was not so bold. It went out of its way to avoid all questions that related directly to abortion, including two questions that it had no valid reason to avoid. It declined to decide whether Ireland had a legitimate aim in protecting the "rights of others," which would have required determining whether fetuses constitute "others" under the Convention. The Court reasoned that because it had found that the law had one legitimate aim—the protection of morals—it did not need to consider any other proposed aims. However, that reasoning assumes that all aims weigh equally in a Court’s analysis of a restriction, an assumption that seems unwarranted. If fetuses count as "others," it is certainly a stronger argument to assert that the law was required to save the lives of "others" than to claim that it was required to protect morals.115

The Court also declined to decide whether article 2’s protection of the "right to life" included the unborn because the clinics did not argue that women have a right to abortion. But the article 2 argument was advanced by Ireland as a defense to the clinics’ claims that Ireland had violated their freedom of expression. Ireland argued that because article 2 protected the right to life of the unborn, it was justified in enjoining information that would threaten that right.116 Thus, the Court’s excuse for failing to resolve the article 2 issue was a non sequitur.117

It should not be a surprise that the Court studiously avoided adjudicating any issues directly touching on the status of the fetus under the Convention. As Glendon’s study demonstrates, the EC states have adopted a range of different legal responses to the issue of abortions. In 1989, the Court had declared Ireland’s criminal prohibition on homosexual sex between consenting adults a violation of article 8 of the Convention, Norris v. Ireland, 13 E.H.R.R. 186 (1989), yet Ireland took four years to comply with the Court’s decision by repealing its ban. Marie O’Halloran, Bill on Homosexuality Passes Second Stage, Ir. Times, June 30, 1993, at 4.

115. The Court might have reasoned that since it found that the restriction was not narrowly tailored to protect (or was not effective in protecting) the lives of the unborn, it would not have mattered whether Ireland’s aim was classified as protecting “others” or “morals.” However, where the aim of a law is to protect lives, a looser fit may be justified given the importance of the goal.


117. In fact, the clinics did argue that women have a right to abortion under article 8 of the Convention, which guarantees the “right to respect for ... private and family life.” Id. at 32. The Court also declined to decide this claim (although this avoidance was more justified), because once the Court had ruled for the clinics on the free expression claim, no purpose would have been served by considering their article 8 claim. Id.
Moreover, following the fall of communism in Central and Eastern Europe, the Council of Europe has opened its membership to the former East Bloc nations as well, greatly increasing the diversity of views on abortion in the Community. One of the many lessons of Roe v. Wade (and of Brown v. Board of Education, for that matter) is that a judiciously-imposed solution to a controversial issue like abortion may test a court's legitimacy. Given the ECHR's reliance on Member States' voluntary compliance with its decisions, the Court may well feel that it cannot impose a uniform solution to the abortion issue, even if it could agree on one. In any event, the Court has never decided an abortion case, and it went out of its way to resolve Open Door without directly addressing the matter.

Nonetheless, the ECHR's decision, while limited to a free expression rationale as a strictly legal matter, is certain to have a broader impact on the ongoing struggle for reproductive rights in Ireland. By requiring that the channels of communication on abortion be kept open, the Court has maintained the possibility for change that the free

118. GLENDON, supra note 1, at 145-57; see also Blinken, supra note 26, at 12 (observing that "[t]he European continent right now is a virtual schizophrenic on abortion rights").

119. GOMIEN, supra note 38, at 7.

120. The extent of potential conflicts is perhaps best exemplified by Germany, which has been attempting to resolve sharp differences between the views of former East and West Germany on abortion. Before the unification of Germany, East Germany permitted abortion for any reason during the first trimester, while West Germany prohibited abortion except in certain circumstances, such as endangerment to the mother's health, risk of damage to the child, pregnancy resulting from rape, or a life situation that would make it difficult for the woman to raise a child. See Constitutional Court Debates the Abortion Issue; Women Register Doubts About Judges' Neutrality, German Info. Center, THE WEEK IN GERMANY, Dec. 11, 1992, available in LEXIS, Nexis Library, WKGERM File.

After unification in June 1992, the German Bundestag adopted a compromise law decriminalizing abortion during the first trimester, but requiring that pregnant women undergo counselling and that the abortion be performed by a physician. Right-to-life politicians challenged the law's constitutionality, and on May 28, 1993, Germany's highest court declared the law unconstitutional because it violated a constitutional provision requiring the state to protect human life. Ursula Knapp, German Court Overturns Liberal Abortion Law, REUTERS, May 28, 1993, available in LEXIS, Nexis Library, REUTERS File. The Bundestag must now revise its law to make abortion illegal but not criminal in the first trimester. Women can still obtain abortions during this period, but only after a consultation with a doctor to make them "aware that the unborn child has its own right to life . . . [and that] abortion can only be considered in exceptional circumstances." German Abortions Ruled Unconstitutional But Women Won't Face Prosecution, Chi. TRIB., May 29, 1993, at 3. Because the Court has held that abortion is illegal (even if not criminal), health insurance will not pay for the procedure, and state-supported hospitals will not perform it. Id. See also Stephen Kinzer, German Court Restricts Abortion Angering Feminists and the East, N.Y. TIMES, May 29, 1993, at 1.

121. 410 U.S. 113 (1973).

exchange of information permits. Indeed, it was precisely to forestall that possibility for change that the S.P.U.C. and other anti-abortion groups in Ireland sought to enact and enforce the eighth amendment to the Irish Constitution. The Court's decision keeps open one of the paths to liberalization that the anti-abortion forces sought to block.

E. The Political Aftermath: The November Referendum

The culmination of the pressures begun by the X, Grogan, and Open Door cases was the November 1992 constitutional referendum on abortion. The referendum put three proposed constitutional amendments to the voters. The first two proposals effectively guaranteed that women would have the right to travel to other EC states for abortions and that information about lawful abortion abroad would be freely available in Ireland. The third proposal, which caused the government to call the ballot the "Pro-life Referendum" (much to the horror of the anti-abortion forces), proposed the following language to be added to article 40.3.3 of the Irish Constitution: "It shall be unlawful to terminate the life of the unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to real and substantive risk to her life, not being a risk of self-destruction."  

The Irish government urged affirmative votes on all three provisions. In essence, the government was forced to reverse the positions it had taken on the central European-Irish issues at stake in

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123. See, e.g., Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (observing that "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market"); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (noting that "[f]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth").


125. Id.

126. The first proposed amendment provided: "There shall be no limit on freedom to travel to another country." The second proposed amendment read: "There shall be no limit on freedom to obtain or make available, subject to conditions laid down by law, information on services lawfully available in another member State [of the European Community]." Id.


128. "The Taoiseach [the Prime Minister] said that he would be campaigning for a 'Yes' vote on all three questions." Denis Coghlan, Reynolds Stands by the Fundamental Principles, IR. TIMES, Oct. 10, 1992, at 5.
Open Door, Grogan, and X. It abandoned its efforts to restrict either information about abortions abroad or the right to travel abroad to obtain an abortion. At the same time, however, the Irish government sought to limit the effect of the X decision on Ireland’s domestic prohibition of abortion, by ruling out the risk of suicide as a ground for justifying abortion.

The Irish voters refused to accept the government’s package deal. Instead, they approved the first two proposals, and rejected the third. Over sixty-two percent of the voters voted to permit women to travel abroad for an abortion, and sixty percent voted to make information on lawful abortion abroad freely available, but an even higher percentage, 65.4 percent, voted to reject the government’s attempt to restrict abortions to save the life of the mother. The results, just nine years after the eighth amendment was approved by a margin of more than two to one, were widely viewed as marking a “sea-change” in Irish society. The November referendum reflected an Irish public willing to acknowledge in an open, de jure manner the “safety valve” that had previously been for the most part unspoken, and available only to those in the “know.” Moreover, the referendum marked a resounding defeat for the anti-abortion forces that had attempted to close that safety valve through restrictions on information and travel.

IV. CONCLUSION

Ireland’s 1983 constitutional amendment to protect the right to life of the unborn was enacted in large measure to insulate Irish abortion laws from liberalizing pressures beyond its borders. Once the

129. Irish Move to the Left and Back Freedom to Travel for Abortion, Eur. Info. Service (EIS), EUR. REP., Dec. 2, 1992, available in LEXIS, Nexis Library, EIS File. Pressure to meet EC standards on travel and to have access to information about abortion abroad reportedly made the first two proposals appear very straightforward to most Irish. However, both pro-choice and pro-life advocates urged a “no” vote on the third proposal. Pro-life adherents would not acknowledge any exceptions on abortion, while reproductive rights advocates felt the third proposal provided too few exceptions. Kevin Cullen, Irish Vote Today on Abortion Law, BOSTON GLOBE, Nov. 25, 1992, at 2; Abortion Referendum, IR. TIMES, Oct. 29, 1992, at 15.

130. Irish Move to the Left and Back Freedom to Travel for Abortion, supra note 129.

131. See, e.g., Jill Serjeant, Legal Abortion on the Way Despite Irish ‘No’ Vote, REUTERS LIBR. REP., Nov. 29, 1992, available in LEXIS, Nexis Library, LBYRPT File (observing that “[w]hat is clear is that there has been a sea-change in Irish society since the 1983 referendum enshrined the rigid ban on abortion”); Andrew Phillips, A New Shade of Green, MACLEAN’s, Dec. 7, 1992, at 22 (identifying a “sea change in opinion” since the X case).
amendment was adopted, anti-abortion forces sought to use it to extend Ireland's abortion prohibitions abroad, by barring both travel for abortions and information about lawful abortion in other countries. Each attempt backfired, resulting ultimately in official legal acknowledgment that Ireland lives in a European Community where other nations permit abortion, and that Irish citizens have a right to know about and avail themselves of those abortion services. A practice that had previously been silently tolerated—"going to England"—became a recognized legal right, and Ireland's domestic restrictions on abortion were liberalized for the first time. By the end of the story, anti-abortion forces were fighting against a Maastricht Treaty protocol designed to insulate Irish abortion law from European oversight because they were no longer satisfied with the state of Irish abortion law itself.

The story of the eighth amendment suggests the difficulty of moral isolationism in the EC. As long as the Community guarantees freedom of travel and exchange of information between Member States, what is legal in one country is available to the citizens of other countries. Ireland can regulate what goes on within its borders, but cannot regulate its citizens' activities in England, Wales, or France. Nor can Ireland escape the pressures that the availability of lawful abortion in neighboring states exerts on its own legal culture. In attempting to insulate itself not only from the legal developments of Europe, but also from the practical effects of lawful abortion readily available in neighboring EC countries, Ireland was ultimately forced to liberalize its own abortion laws and to acknowledge formally the unstated route by which thousands of Irish women obtain lawful abortions every year.

The chronicle of Ireland's abortion restrictions also illustrates the complex interrelationship between international law and international travel and communication. In this account, international law worked hand-in-hand with the reality of increased interchange between nations. The existence of relatively easy travel and communication not only undermined Ireland's practical ability to restrict its own citizens' freedoms, but also proved fatal to its attempts to justify its actions as a matter of international law under the European Convention. In turn, the freedom of communication guaranteed by the European Convention has had practical effects on the abortion issue in Ireland in part because technology has made communication and travel easier. As interchange between nations becomes more readily available, the
force of international law becomes less a matter of moral persuasion and more a matter of practical reality.

In the Irish abortion example, international pressure was liberalizing, but it need not always be so. In March 1993, Poland amended its abortion law to end thirty-seven years of abortion on demand. Abortion is now permitted only in very limited circumstances. At the same time, in order to halt "abortion tourism" from neighboring Poland, the Czech Republic reaffirmed a 1986 law that prohibits foreigners from having abortions in the Czech Republic. The Minister of Health stated that "[i]f we start promoting imported abortions it could provoke conservative Catholics and lead to more strict conditions in this country." In this instance, the pressure of a neighboring country seems to be running in the opposite direction.

Thus, while the Irish abortion story suggests the inevitability of international influence, the emerging Czech-Poland story suggests that such influence will not always be liberalizing. Rather, the interrelated forces of international law and international exchange are likely to pull nations outside of the mainstream toward the consensus view of the relevant international community. On the abortion front, these forces may be more likely to rein in the ends of Professor Glendon's continuum than to shift the continuum in one direction or another.

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132. The new law permits abortion only when pregnancy endangers a woman's life or is the result of rape or incest, the fetus is irreparably damaged, or an abortion is necessary as an emergency procedure to save the woman's life. The acting doctor as well as two other doctors must certify that the woman's life is in danger, and prenatal tests are required to show the fetus is irreparably damaged. John Darnton, Abortion in Poland: Restrictive Law is Denounced, Chi. Trib., Mar. 28, 1993, at 4.


134. See Glendon, supra note 1, at 14.