The European Union and Abortion Tourism: Liberalizing Ireland’s Abortion Law

Abigail-Mary E.W Sterling
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INTRODUCTION

In a referendum held on November 25, 1992, Irish voters passed the Thirteenth and Fourteenth Amendments to the Irish Constitution. The Thirteenth Amendment provides for the freedom to travel to another Member State of the European Union (EU) in order to obtain an abortion. The Fourteenth Amendment grants the freedom to furnish information about abortion services legally available in another Member State, subject to conditions set forth by law. This vote was a response to the incompatibility of Irish abortion laws with EU law and seemed to ensure the liberalization of Ireland’s abortion laws.

In the wake of this referendum, the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill was enacted by the Irish Parliament (the Oireachtas) to give legislative form to the Fourteenth Amendment. The Supreme Court of Ireland approved the bill on May 12, 1995, upon reference to the Court by President Mary Robinson. The bill, now known as the Abortion Information Act, states that it shall not be unlawful to publish or to procure the publication of information relating to abortion services and service providers lawfully available outside Ireland, so long as the information is objective, does not advocate or promote abortion and sets forth all

4 See id. at 206.
6 See Tompkin & Hanafin, supra note 1, at 190.
7 See In re Article 26 of the Constitution and the Reference to the Court of the Regulation of Info. (Services Outside the State for Termination of Pregnancies) Bill 1995, [1995] 2 I.L.R.M. 81, 116 (Ir. S.C.) [hereinafter Regulation of Information Bill].
the options for handling an unwanted pregnancy. Some commentators believe that the Supreme Court's decision upholding the Act moved Ireland a step closer to legalizing abortion on demand within its borders.

The Act is the culmination of years of litigation and controversy over abortion rights under Irish and EU law. For years the Irish courts tried to insulate Ireland from the availability of abortion outside its borders by issuing injunctions prohibiting both the dissemination of information about such abortions and travel to obtain them. The European Court of Justice (ECJ) and the European Court of Human Rights (ECHR), however, each issued decisions that weakened these prohibitions. They were further weakened when the debate over Protocol 17 of the Maastricht Treaty, which provided that nothing in the Treaty would affect Ireland's established abortion law, jeopardized the Treaty's prospects for ratification and forced the Irish government to ask that a Solemn Declaration be added to Protocol 17. Ireland has an image of being an ambitious member of the EU, and the passage of the Abortion Information Act fits its progressive reputa-

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8 See id. at 81–82.
9 See Michael O'Regan, Leading Judge Condemns Abortion Information Act, IRISH TIMES, July 10, 1995, at 4 (quoting Mr. Justice Brian Walsh, a member of the European Court of Human Rights and a former Irish Supreme Court justice).
10 See Geraldine Kennedy, President Signs Bill as Court Ends Legal Challenge, IRISH TIMES, May 13, 1995, at 1.
12 See Case C-159/90, Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan, [1990] E.C.R. 1–4733, 4740, [1991] 3 C.M.L.R. 849, 891 (1990) (indicating that if providers of information have some agency relationship with clinics outside the State, or if the clinics themselves advertise in Ireland, the freedom to distribute information would be protected under EU law); Open Door Counselling v. Ireland, 15 E.H.R.R. 244, 267–68 (1992) (restraint on the distribution of information regarding availability of abortion disproportionate to aim of protecting the right to life of the unborn, so that restraint was a breach of Article 10 of the European Convention).
13 See Anna Eggert & Bill Rolston, Ireland, in ABORTION IN THE NEW EUROPE 157, 166–68 (Anna Eggert & Bill Rolston eds., 1994).
Ultimately, it was Ireland's participation in the EU and the resultant pressure of international public opinion and EU law that forced the Irish Supreme Court and the government to liberalize abortion laws.16

This Note will examine how Ireland's membership in the EU has affected the courts' and the legislature’s ability to prevent abortions in Ireland. First it will look at the history of abortion law in Ireland and how its relative ineffectiveness led to the passage of the Eighth Amendment to the Constitution, which codified the right to life of the unborn. The second part will set out the case law regarding abortion following the passage of the Eighth Amendment. These cases involved the right to information about the availability of abortions in other Member States of the EU and the right to travel to obtain an abortion. Next it will discuss how the cases influenced the ratification referendum for the Maastricht Treaty, and led both to a referendum amending the Irish Constitution and a law authorizing the dissemination of information about abortions abroad. This Note analyzes how the availability of abortion services in other EU Member States and EU law protecting an Irish woman's right to avail herself of these services compelled Ireland to revise its laws accordingly. Finally, this Note concludes that because Irish women can now easily and legally obtain information about how to have abortions in other Member States and because they have the freedom to travel in order to obtain them, it will only be a matter of time before Ireland gives up its merely symbolic opposition to abortion and allows abortion on demand within its borders.

I. ABORTION UNDER THE IRISH CONSTITUTION

A. Historical Background

Prior to 1983, Ireland outlawed abortion through Sections 58 and 59 of the Offenses Against the Persons Act of 1861 and Section 10 of the Health (Family Planning) Act of 1979.17 Sections 58 and 59 state:

Of every pound the Irish pay to the EU, they receive roughly six back through Structural Funds and the Common Agricultural Policy. See id.

15 See James F. Clarity, Irish Begin to Liberalize Laws on Sex and Family, N.Y. TIMES, June 16, 1993, at A10 [hereinafter Clarity, Irish Begin]; Cooney, supra note 14, at 15.


17 See Tompkin & Hanafin, supra note 1, at 181.
Every Woman, being with Child, who, with Intent to procure her own Miscarriage, shall unlawfully administer to herself any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, and whosoever, with Intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall unlawfully administer to her or cause to be taken by her any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, shall be guilty of a Felony. . . .

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 with Child, shall be guilty of a Misdemeanor. . . .

Distribution of material that advocated abortion was also illegal under the Censorship of Publications Act 1946, although the act dealt with written information rather than verbal counseling of pregnant women. The passage of the 1967 Abortion Act, however, made abortion before viability (the point at which the fetus can survive outside the womb) lawful in England under certain easily-achievable conditions, and within the next twenty years the rest of Europe also permitted abortions under certain conditions. This meant women in Ireland could get an abortion simply by crossing the Irish Sea.

The availability of foreign abortions, and a fear among the anti-abortion coalition that an Irish equivalent of Roe v. Wade could occur, convinced the coalition to promote a referendum that led to the enactment of Article 40.3.3 (the Eighth Amendment) of the Irish Constitution. Nonetheless, the amendment did not stop abortion

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18 Offenses Against the Persons Act, 1861, 24 & 25 Vict., ch. 100, §§ 58–59 (Eng.).
20 See Cole, supra note 16, at 116. Abortions were lawful when two doctors certified that the baby would be born with a serious handicap, or if the pregnancy would pose a greater risk to the health or life of the mother or any of her born children than an abortion would pose. See id.
21 See id. at 119. This practice became so prevalent that the phrase "going to England" developed into a euphemism for getting an abortion in England. See id. at 119–20.
22 See James Casey, Constitutional Law in Ireland 345 (1992); see also Tompkin & Hanafin, supra note 1, at 182; see generally Roe v. Wade, 410 U.S. 113 (1973). The amendment added the
tourism. Consequently, anti-abortion organizations brought actions to prevent the dissemination of information about the availability of abortions abroad.

B. Interpreting the Eighth Amendment in the Irish Courts

In June 1985, the Society for the Protection of Unborn Children (S.P.U.C.) initiated litigation against Open Door Counselling Ltd. and Dublin Well-Woman Centre Ltd., two clinics that gave non-directive counseling to pregnant women and referred them to English clinics that provide abortion services. S.P.U.C. claimed this counseling was a breach of Article 40.3.3 and asked for an injunction against such counseling. The Irish Supreme Court upheld the injunction issued by the High Court and held that giving information about abortion assisted in the ultimate destruction of human life. The court held that the right to life is absolute and trumps the right to freedom of expression because there is no implied or unenumerated right to information that could destroy the expressly guaranteed right to life of the unborn. The court rejected the idea that the case implicated questions of EU law and refused to refer the case to the ECJ.
Injunctions in Ireland apply to all those who have notice of them, so this ruling effectively forced abortion counseling underground.\textsuperscript{31} Enjoining all abortion counseling organizations made future challenges more likely.\textsuperscript{32} The clinics took their case to the European Commission on Human Rights under Article 10 of the European Convention on Human Rights, which advocates freedom of information.\textsuperscript{33} Meanwhile, S.P.U.C. sought another victory, this time targeting student groups that published information about abortions.\textsuperscript{34}

In October 1988, S.P.U.C. brought a suit against three student organizations that refused to comply with their request not to print abortion information in their student guidebooks.\textsuperscript{35} The defendants, officers of the organizations, expected that a defense to the injunction based on the right to information as a civil liberty or as a human right would fail.\textsuperscript{36} Instead, they focused on the legal-economic right to information about services available in other Member States under the Treaty of Rome.\textsuperscript{37} They argued that there is a right to disseminate such information under EU law because publishing and obtaining the information is a corollary right to the right to travel to other Member States in order to obtain services,\textsuperscript{38} and under Article 29.4 of the Irish Constitution, EU law takes precedence over Irish law.\textsuperscript{39} The High Court refused to issue the injunction and instead referred the case to the ECJ under Article 177 of the Treaty.\textsuperscript{40} The ECJ was asked to rule on three questions as to whether or not abortion clinics were a “service” under Article 59 of the Treaty of Rome, and on the right of a Member State

\textsuperscript{31} See Eggert & Rolston, supra note 13, at 164; Anne M. Hilbert, Comment, The Irish Abortion Debate: Substantive Rights and Affecting Commerce Jurisprudential Models, 26 Vand. J. Transnat’l L. 1117, 1135 (1994). Open Door Counselling closed, the Dublin Well Woman Centre stopped providing pregnancy counseling altogether, and social workers and other professionals were warned that they could be subject to legal action if they provided any form of abortion counseling. See Eggert & Rolston, supra note 13, at 163–64.

\textsuperscript{32} See Hilbert, supra note 31, at 1135.

\textsuperscript{33} See Eggert & Rolston, supra note 13, at 164.

\textsuperscript{34} See Kelly, supra note 24, at 205.

\textsuperscript{35} See Eggert & Rolston, supra note 13, at 164–65.


\textsuperscript{38} See Wilkinson, supra note 36, at 25.

\textsuperscript{39} See id. at 24–25.

where abortion is illegal to also prohibit the distribution of information about the identity, location and means of communication with abortion clinics in another Member State.41

In an appeal by S.P.U.C., the Supreme Court granted the injunction but could not overturn the reference to the ECJ.42 The Court rejected the idea that publishing information about the abortion clinics was any different from the counseling it prohibited in *Society for the Protection of Unborn Children v. Open Door Counselling*.43 As in *Open Door* the Court found that the right to freedom of expression and the implied right to information were subordinate to the right to life of the fetus.44 It also made it clear that it did not think EU law could override the right to life.45

The immediate effect of the Supreme Court’s judgment was that publication of any kind of information about British abortion clinics was unconstitutional and forbidden.46 The ECJ’s ruling in October 1991 did not change this situation.47 The court held that abortion was a service under Article 60 of the Treaty of Rome, but the defendants were not providers of the service or agents of the clinics.48 Without this economic tie, the prohibition could not be regarded as a restriction on the freedom to supply services within the meaning of Article 59 of the Treaty and thus was not protected.49

This decision was a defeat for the student groups, but it was a better result than had been recommended to the ECJ by the Advocate Gen-

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41 See Kelly, *supra* note 24, at 205.
44 See Reid, *supra* note 19, at 26.
45 See *Grogan*, [1989] I.R. at 765. In a separate opinion, Judge Walsh insinuated that the Irish Supreme Court would have the last word on the subject regardless of how the ECJ ruled. See *id.* at 768-69 (Walsh, J., concurring).
46 See Eggert & Rolston, *supra* note 13, at 165. Despite this prohibition, pro-choice advocates contrived inventive ways to spread the information, such as printing clinics’ telephone numbers on T-shirts, singing them in a song, and reading them during Parliamentary debates so that they would be in the Parliamentary record. See *id.* One of the student groups, the Union of Students of Ireland, continued to provide non-directive crisis counseling including giving information about abortions and providing the telephone numbers of British Pregnancy Advisory Services. See Kelly, *supra* note 24, at 205.
48 See *id.* at 4740.
49 See *Tompkin & Hanafin*, *supra* note 1, at 188.
eral.\textsuperscript{50} The Advocate General found that the prohibition was counter to the principle of free movement of services under Article 59, but that the restriction was justified under the public policy exception of Article 56.\textsuperscript{51} With the ECJ's decision, however, a different result was possible for those trying to distribute information with the requisite economic ties to the clinics.\textsuperscript{52} The Court also implied that if a woman had appealed to them on the grounds that she had been prevented from traveling to England, or if she had been severely disadvantaged by the lack of available information, the outcome would have been different.\textsuperscript{53} Furthermore, the decision indicated that Ireland's treatment of access to abortion was not only a matter of Irish law, but because of the implication that abortion is a service under the Treaty, it was also a matter of EU law.\textsuperscript{54}

Despite the apparent victory for the anti-abortion forces, an event occurred in February 1992 that severely impacted their success.\textsuperscript{55} The parents of a pregnant fourteen-year-old rape victim informed the Irish police that they planned to take their daughter to England for an abortion.\textsuperscript{56} They wanted to know about the possibility of using a DNA test on the aborted fetus as evidence against the rapist.\textsuperscript{57} While in England they learned that an injunction had been granted against the abortion, and they returned to Ireland to fight it in the High Court.\textsuperscript{58}

The High Court upheld the injunction because it found that Article 40.3.3 was an expression of public policy that permitted derogation under EU law, and that the injunction was proportionate to its aim of protecting the life of the unborn.\textsuperscript{59} The decision was extremely un-

\textsuperscript{50} See Cole, \textit{supra} note 16, at 128. The Advocate General makes recommendations for rulings to the ECJ. See \textit{id}.


\textsuperscript{52} See \textit{CASEY}, \textit{supra} note 22, at 350; Cole, \textit{supra} note 16, at 129.

\textsuperscript{53} See Eggert & Rolston, \textit{supra} note 13, at 165.

\textsuperscript{54} See Cole, \textit{supra} note 16, at 129.

\textsuperscript{55} See Eggert & Rolston, \textit{supra} note 13, at 166.


\textsuperscript{57} See Eggert & Rolston, \textit{supra} note 13, at 166.


\textsuperscript{59} See \textit{id.} at 15–16.
popular with both the people and the government. Criticism came from various political parties, and even the Catholic Church let it be known that it believed the girl should have been allowed to go to England. The family was going to comply with the decision, but the government convinced them to appeal it.

The Supreme Court took note of the international attention and criticism evoked by the High Court’s decision, and it recognized that the government was under pressure to uphold the Constitution without appearing to treat the girl too harshly. The Court found that because the girl had threatened suicide if she were forced to have the baby, her life, not just her health, was at risk. Therefore the abortion was permissible under Article 40.3.3. In this case, the right to life of the mother outweighed the right to life of the unborn, and so in this instance, abortion was allowed within Ireland.

The Court managed to avoid any issues of EU law by ruling as it did, but it did not escape controversy. Some did not believe the judgment was particularly radical because it held that the right to travel was still subordinate to the right to life of the unborn. However, it did give the medical profession room to maneuver. It was a remarkable political reversal; the Eighth Amendment appeared merely sym-

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60 See Emily O'Reilly, Masterminds of the Right 132-33 (1992). Ruth Riddick, an abortion rights advocate, said the effect of the case was revolutionary. 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, (Magazine) at 22, 34. “What happened is that we as a people said out loud, in the streets, in pubs, in our workplaces, on buses, in taxis, 'If she were my daughter, I would have had her off to England.' And while we know that is how Irish people have always felt in these terrible circumstances, we never said it before.” Id.


62 See Byrne & Binchy, supra note 3, at 160; O’Reilly, supra note 60, at 133.

63 See Eggert & Rolston, supra note 13, at 167.


65 See id. at 53-54.

66 See id.

67 See Casey, supra note 22, at 348.


69 See Byrne & Binchy, supra note 3, at 165; see also O’Reilly, supra note 60, at 137 (anti-abortion law professor William Binchy said Ireland now had the most liberal abortion law in the world); Andy Pollak, Hierarchy Criticizes Supreme Court, Irish Times, July 1, 1995, at 8 (Catholic Bishops issued statement that the judgment “introduced into Irish law the idea that it would be legal to perform an action with the intention and purpose of killing an innocent human being”).

70 See Reid, supra note 19, at 26-27.

71 See O’Reilly, supra note 60, at 136 (quoting Gerard Hogan).
Perhaps the decision's greatest significance, however, is that it revived the abortion debate and drew attention to the Maastricht Treaty, which was scheduled for a ratification vote in Ireland on June 12, 1992.

C. The Maastricht Treaty and Protocol 17

The Treaty on European Union, or the Maastricht Treaty, was negotiated during the Fall of 1991. It was designed to promote an economic, monetary and political union among the nations that joined it. Although the Treaty did not involve abortion, the Irish government secretly negotiated the addition to it of Protocol 17. Protocol 17 was drafted to avoid the use of European law in a case where the economic ties referred to in Grogan were present, thus protecting Irish abortion law from being overridden by EU law. The effect was to deprive litigants of their right to use EU law rights as a defense in abortion cases arising in Ireland. The government hoped this would encourage support from anti-abortion groups that might otherwise have campaigned against the Treaty because it allowed EU law to override Article 40.3.3.

At the time Protocol 17 was drafted, Article 40.3.3 seemed to represent a virtual ban on abortion. In the wake of Attorney General v. X,

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72 See id. at 137; see also Tompkin & Hanafin, supra note 1, at 184. In the aftermath of the decision, polls showed a major shift in public opinion, with a majority favoring abortion in certain circumstances. See O’Callaghan, supra note 60, at 34.

73 See van Wijnbergen, supra note 14, at 184.

74 See Eggert & Rolston, supra note 13, at 166.

75 See Cole, supra note 16, at 134.

76 An Irish official claimed that the Maastricht Treaty would not allow or prevent abortions in Ireland because it did not have anything to do with abortion. See Mark M. Nelson, In Maastricht Treaty, You Find What You Read into It, WALL ST. J. (Europe), June 30, 1992, at 9. Despite this official’s claim, the abortion issue became so closely linked to the Treaty that a constituent asked her TD (Member of Parliament) if “Maastricht is the Dutch word for abortion.” van Wijnbergen, supra note 14, at 183.

77 O’Reilly, supra note 60, at 140. Protocol 17 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.” EC Treaty, protocol 17 [Regarding Ireland].


79 See van Wijnbergen, supra note 14, at 183.


81 See id. at 111.

82 See O’Reilly, supra note 60, at 140.
however, the Protocol had the opposite effect, and it posed major problems for the government.\textsuperscript{83} The case made it clear that while an injunctive power still existed with regard to abortions abroad, there were some cases where abortion would be legal.\textsuperscript{84} This posed problems for both sides of the debate, for neither side wanted the Protocol to freeze the status quo.\textsuperscript{85} Consequently, both sides fought against the Treaty.\textsuperscript{86}

Pro-choice and women's groups recommended that women not vote for the Treaty because it denied them the basic rights to obtain information and travel.\textsuperscript{87} The Catholic Church warned people not to vote for it because it allowed abortions to be performed in Ireland.\textsuperscript{88} With all sorts of interest groups working against it, it appeared that the Treaty would fail, and that the whole European economic unification process would be derailed.\textsuperscript{89}

In order to appease the Treaty's opponents, the government tried to convince the Member States to amend the Protocol.\textsuperscript{90} That would have required re-opening the Treaty, and risking more revisions and re-ratification in some States, so the Member States refused.\textsuperscript{91} A Solemn Declaration was approved at a regular meeting of Foreign Ministers instead.\textsuperscript{92} It stated that the Protocol is not meant to “[l]imit freedom either to travel between Member States or, in accordance with EU law, by Irish legislation, to obtain information relating to services lawfully available in other Member States.”\textsuperscript{93} The government hoped that feminist opponents would be satisfied that they could continue to travel for an abortion, and that no more court rulings would ensue to provoke S.P.U.C.\textsuperscript{94} It attempted to export the abortion issue in that the Eighth

\textsuperscript{84} See Byrne & Binchy, supra note 3, at 185–86.
\textsuperscript{85} See Corbett, supra note 83, at 66.
\textsuperscript{86} See id.
\textsuperscript{87} See O'Reilly, supra note 60, at 145; see also The Galway Forum on Maastricht, Maastricht Treaty on European Union: A Positive Case for a No Vote 15 (1992) (warning that ratification of the Treaty would relegate Irish women to the status of second-class citizens because they would have less rights than men or other European women).
\textsuperscript{88} See O'Reilly, supra note 60, at 146.
\textsuperscript{89} See Eggert & Rolston, supra note 13, at 167–68.
\textsuperscript{90} See Hogan, supra note 80, at 117; van Wijnbergen, supra note 14, at 184.
\textsuperscript{91} See Hogan, supra note 80, at 117; Reid, supra note 19, at 33.
\textsuperscript{92} See van Wijnbergen, supra note 14, at 184.
\textsuperscript{93} Hogan, supra note 80, at 118.
\textsuperscript{94} See Eggert & Rolston, supra note 13, at 168.
Amendment would still be in force, but the courts would not have to enforce it if women would travel abroad for an abortion.95

The Solemn Declaration did not appear to be legally binding on the ECJ, nor to serve as anything more than an interpretive guide for the courts.96 It did not convince anyone that the Protocol was not intended to derogate from free circulation and freedom to provide services.97 But it did effectively separate the two issues of abortion and the Treaty.98 In another effort to appease the abortion rights advocates, the government promised to hold a referendum on abortion after the ratification vote.99 In addition, the government strategically emphasized the economic implications of the Treaty.100

All of these factors were enough to secure a victory for the government; on June 18, 1992, the Irish people voted in favor of ratification 68.7% to 31.3%, with a 57% turnout.101 This vote indicated that the Irish public valued European unity more than it valued preventing access to abortion outside Ireland.102 In exchange for ratification of the Maastricht Treaty, the outcome of the Attorney General v. X decision forced the government to change its position from one that sought to protect Ireland's restrictive abortion laws from an override by EU law to one which guarantees the right to access to abortions in other Member States.103

96 See CLIVE H. CHURCH & DAVID PHINNEMORE, EUROPEAN UNION AND EUROPEAN COMMUNITY: A HANDBOOK & COMMENTARY ON THE POST-MAASTRICHT TREATIES 451 (1994); see also Hogan, supra note 80, at 118-19.
97 See CORBETT, supra note 83, at 66. In fact, the intention of the Protocol was the opposite of what the Solemn Declaration said it was. See Browne, supra note 78, at 12.
98 See Eggert & Rolston, supra note 13, at 168.
99 See id.
100 See id. The prime minister announced that ratifying the Treaty could lead to a doubling of the £3 billion in subsidies Ireland was then receiving. See id. The Treaty also contained a Protocol on Cohesion that included a commitment to an extension of Structural Funds, of which Ireland is one of the main recipients, while it allowed a decrease in the matching contributions that must be received from Member States. See van Wijnbergen, supra note 14, at 181. In addition, the government warned the electorate that a "No" vote would deprive Ireland of an IEP £8 billion increase in funds between 1993-1997. See id. at 183.
101 See CHURCH & PHINNEMORE, supra note 96, at 448.
D. The ECHR's Open Door Decision

The referendum about abortion issues that the government promised was set for November 25, 1992. As Ireland prepared to vote, the ECHR handed down its opinion in *Open Door Counselling & Dublin Well Woman v. Ireland*. The Court, using a careful scrutiny test, found that the ban on information violated Article 10 of the European Convention because it prevented the clinics from providing information, and was disproportionate to the aims pursued by the injunction. The ban did not prevent women from going abroad for abortions. It just restricted information that was available from other sources, and in light of the *Attorney General v. X* decision, the Irish government had to concede that if some women are entitled to have an abortion under Irish law, then they should be entitled to information about how to obtain one. The Court also held that the injunction disproportionately harmed women who did not have the resources to find out how to get the information, and only served to prolong the amount of time that women would have to wait before having an abortion, which could be detrimental to their health.

The decision gave legal recognition to the right of a free flow of information across EU borders, even when it threatens a Member State's moral views. While the Advocate General determined that Ireland could derogate from EU law with respect to the freedom of

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104 See Tompkin & Hanafin, *supra* note 1, at 186.
105 See id. at 136; see also *Open Door Counselling v. Ireland*, 15 E.H.R.R. 244 (1992).
106 See *Open Door Counselling*, 15 E.H.R.R. at 268.
107 In fact, the British Office of Population Census and Surveys said that during the 1980s about 37,290 Irish women had abortions in England, and the numbers increased even as measures to prevent abortion in Ireland increased. See O'Callaghan, *supra* note 60, at 25. In 1991, according to official British statistics, 4154 women from Ireland had abortions in Britain, but the actual number is probably much higher. See Eggert & Rolston, *supra* note 13, at 159. Many women do not give real names or addresses, so it is impossible to get a precise number. See id. Counselors in organizations such as the Ulster Pregnancy Advisory Association estimate the true number as anywhere from one and one half to two times the official numbers, and that still does not account for those Irish women having abortions in countries other than Britain. See id. Figures for 1993 show that 4400 Irish women had abortions in England. *See Court Rules in Favor of Allowing Information on Abortion, Agence France Presse*, May 12, 1995, available in LEXIS, World Library, Curnws File. Maxine Brady, President of the pro-choice Union of Students in Ireland said that proportionately, Ireland may have one of the highest abortion rates in Western Europe. See O'Callaghan, *supra* note 60, at 24.
108 See *Open Door Counselling*, 15 E.H.R.R. at 266.
109 See id. at 267.
information on public policy grounds, the ECHR served notice that Ireland did not have unlimited or unreviewable discretion in such matters. Ireland was not required to follow the ruling; rulings of the ECHR bind the State in the international court of public opinion, but they do not override conflicting decisions of the Irish Court. However, in light of the decision, if Ireland did not approve the upcoming referendums, it would have put the country in an embarrassing conflict with its European partners and could have led to more legal challenges.

E. The Abortion Referendum

Less than a month later the abortion referendum was held. Part One dealt with whether or not Article 40.3.3 should mean that the freedom of Irish women to travel between Member States can be impaired. It was passed by a vote of 62.3% to 37.7% to become the Thirteenth Amendment to the Irish Constitution. It does not constitutionally entitle a woman to receive an abortion abroad, but it means the courts cannot enjoin a woman from going abroad to have an abortion.

The second part of the referendum involved whether or not the Constitution could restrict freedom of information about abortion services in other Member States. The people voted 60% to 40% in favor of the freedom to obtain information, and it became the Fourteenth Amendment. This does not mean abortion referral is legal. Instead, it makes it permissible to give and receive information about abortion and its effects, but not about the identity or location of clinics.

112 See CASEY, supra note 22, at 349.
114 See Eggert & Rolston, supra note 13, at 169.
115 See id.
116 See Irish Move to the Left, supra note 5.
117 See Byrne & Binchy, supra note 3, at 198.
118 See Eggert & Rolston, supra note 13, at 169.
119 See Regulation of Information Bill, [1995] 2 I.L.R.M. 81, 81 (Ir. S.C.); Irish Move to the Left, supra note 5. The Amendment states: "This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state." Byrne & Binchy, supra note 3, at 206.
120 See id.
as the distribution of such information would lead to the destruction of unborn life.\textsuperscript{121}

The last part of the referendum received the most attention and reflected the distinction between a mother’s life and health that Chief Justice Finlay laid out in the \textit{Attorney General v. X} decision.\textsuperscript{122} It was rejected by a vote of 65.4\% to 34.6\%.\textsuperscript{123} By rejecting this provision, the Irish people voted to keep the status quo reached in the \textit{Attorney General v. X} decision,\textsuperscript{124} and left it to their legislators to work out the problem.\textsuperscript{125}

In urging the passage of the three amendments, the government essentially reversed the positions it had taken in the three major abortion cases.\textsuperscript{126} The results amounted to a transformation in Irish society, marking a defeat for the anti-abortion forces that had attempted to put an end to abortion tourism through prohibitions on information and travel.\textsuperscript{127} The two amendments undid the effects of Protocol 17 and ensured that the ECHR and the ECJ would not find that Ireland violated either of these freedoms.\textsuperscript{128}

Despite the outcome of the referendum and the adoption of the Fourteenth Amendment, the Supreme Court refused to lift the injunction against the clinics in the \textit{Open Door} case when it was brought before it in July 1993.\textsuperscript{129} The court held that the law would have to be changed before the injunction could be lifted.\textsuperscript{130} Subsequently, the Attorney General wrote a letter to the Council for the Status of Women

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\footnote{121 See \textit{id.} at 206--07.}
\footnote{122 See \textit{id.} at 196--97. The proposal stated: “It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction.” \textit{Id.} at 195.}
\footnote{123 See \textit{Irish Move to the Left}, \textit{supra} note 5.}
\footnote{124 See James F. Clarity, \textit{Ireland Apparently Turns Down Freer Abortion Law}, \textit{N.Y. Times}, Nov. 27, 1992, at A3.}
\footnote{125 See Eggert & Rolston, \textit{supra} note 13, at 169. The vote has been interpreted differently by those on both sides of the issue: pro-choice groups claim it meant that people were rejecting such a restriction, and anti-abortionists claim it meant that they rejected legalized abortion. See O’Callaghan, \textit{supra} note 60, at 24, 34. A poll by the Irish Countrywomen’s Association found that 73\% of its members favored the availability of abortion when a woman’s health was at risk, and 63\% felt it should be available in cases of rape or incest. See \textit{id.} at 34. As the question was framed, however, there was no outlet for this point of view in the referendum. See \textit{id.}}
\footnote{126 See Cole, \textit{supra} note 16, at 139.}
\footnote{127 See \textit{id.} at 140.}
\footnote{128 See Eggert & Rolston, \textit{supra} note 13, at 169.}
\footnote{129 See \textit{id.} at 164.}
\footnote{130 See \textit{id.}.}
in which he stated that while the injunction was properly given at the
time, it was now inconsistent with the Constitution.\footnote{131}

F. The Abortion Information Act

In order to give some legislative form to the Fourteenth Amend­
ment, the Oireachtas passed the Abortion Information Act.\footnote{132} The
Supreme Court declared it constitutional on May 12, 1995, in what has
been called “one of the most significant decisions of an Irish Court”
since the founding of the State.\footnote{133} The judgment finally removed any
doubt as to what is permissible in the area of pregnancy and abortion
counseling.\footnote{134} It reconciled the legal and political changes in Ireland’s
abortion history to bring consistency to its abortion law.\footnote{135}

In finding the Act constitutional, the Court recognized that the
provisions of the Fourteenth Amendment and the Eighth Amendment
conflicted with each other, but held that the people understood this
conflict when they voted for the amendment, so it was up to the
Oireachtas to balance the constitutional rights.\footnote{136} The Court, using the
standards of “prudence, justice and charity”\footnote{137} found that the Act’s
provisions properly reflected this balance because they are not so
“contrary to reason and fairness as to constitute an unjust attack on
the constitutional rights of the unborn or any other person.”\footnote{138}

Anti-abortion groups condemned the judgment.\footnote{139} They saw it as
further eroding the fundamental right to life.\footnote{140} But it was also seen as
the logical result of the years of battling over the abortion issue.\footnote{141} The

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  \item \footnote{131} See Uinsionn Mac Dubhghaill, AG Says Abortion Rights in Operation Despite Ruling, IRISH TIMES, Aug. 6, 1993, at 1. Once the Abortion Information Bill was declared constitutional by the Supreme Court, S.P.U.G. also accepted that Dublin Well Woman Centre has the right to provide information regarding abortion services. See Victory for Abortion Advice Service, The INDEPENDENT, June 24, 1995, at 7.
  \item \footnote{132} See Tompkin & Hanafin, supra note 1, at 190.
  \item \footnote{133} William Binchy, Abortion Ruling One of the Most Significant Legal Decisions Since the Foundation of State, IRISH TIMES, May 15, 1995, at 12.
  \item \footnote{134} See Trish Hegarty, Court Decision Removes Doubt, Says Noonan, IRISH TIMES, May 13, 1995, at 7 (quoting the Minister for Health).
  \item \footnote{135} See Kennedy, supra note 10, at 1.
  \item \footnote{137} Id.
  \item \footnote{138} Id.
  \item \footnote{139} See O’Regan, supra note 9, at 4; Pollak, supra note 69, at 8.
  \item \footnote{140} See Pollak, supra note 69, at 8.
  \item \footnote{141} See Noel Barber, No Surprise Abortion Bill Found to be Constitutional, IRISH TIMES, June 13, 1995, at 9.
\end{itemize}
Attorney General v. X decision permitted abortion on Irish soil, and this legislation simply endorsed it by allowing women easy access to information about abortion.\textsuperscript{142} The legislation also took the changing attitudes of the Irish people into account; they had changed the rules about abortion information in the 1992 referendum, and the Act simply gave legislative form to this change in attitude.\textsuperscript{143}

II. THE FUTURE OF ABORTION IN IRELAND

In the twenty years after England legalized abortion with the 1967 Abortion Act, most of Europe did as well, allowing abortion at least in certain circumstances.\textsuperscript{144} The resultant availability of abortions in these countries prompted Ireland to revise its laws accordingly.\textsuperscript{145} It used the Censorship of Publications Act to prevent the dissemination of information about abortions.\textsuperscript{146} In 1983 it passed a constitutional amendment to protect the life of the unborn.\textsuperscript{147} With this amendment the anti-abortionists were positioned to take a strong stance against anything that encouraged abortion tourism.\textsuperscript{148}

The Supreme Court’s decisions in the \textit{Open Door} and \textit{Grogan} cases reflected the anti-abortion movement’s goal of protecting the right to life of the unborn by preventing abortion tourism.\textsuperscript{149} Despite these

\textsuperscript{142} See Hegarty, \textit{supra} note 134, at 7. The Supreme Court stated as much in the opinion: “Once the termination of the pregnancy is permissible, the mother has the right to all relevant information necessary to enable her to have the pregnancy terminated and this includes the information which was the subject matter of the orders in the S.P.U.C. case, viz information with regard to the identity and location of and method of communication with a specified clinic or specified clinics.” \textit{Regulation of Information Bill}, [1995] 2 I.L.R.M. 81, 98 (Ir. S.c.).

\textsuperscript{143} See \textit{id.} at 108-09; Kennedy, \textit{supra} note 10, at 1. The changing attitudes of the Irish people were further illustrated by a referendum in November 1995 to remove the prohibition against divorce from the Constitution. \textit{See Divorce Bill to Go to Seanad after Passing Final Stage Without a Vote, IRISH TIMES, Sept. 26, 1996, at 8 [hereinafter Divorce Bill]; Introducing Divorce, IRISH TIMES, Sept. 26, 1996, at 15; Nell McCafferty, \textit{Divorce—Irish Style}, NEWSDAY, Jan. 14, 1996, at A40. The Irish people decided by a margin of 9000 votes out of the approximately one million cast to allow divorce in Ireland. \textit{See McCafferty, \textit{supra} at A40. The bill to legalize it, the Family Law (Divorce) Bill, passed its final stages in the Dail without a vote and has gone to the Seanad for final passage. \textit{See Divorce Bill, \textit{supra} at 8. The passage of the Abortion Bill and the imminent passage of the Divorce Bill have been characterized as a watershed in Irish family law. \textit{See William Binchy, Marking a Watershed in Irish Family Law, IRISH TIMES, Jan. 28, 1996, at 12.}


\textsuperscript{145} See \textit{id.} at 117.

\textsuperscript{146} See Kelly, \textit{supra} note 24, at 199–200; Reid, \textit{supra} note 19, at 26.

\textsuperscript{147} See \textit{TOMPKIN} \& \textit{HANAFIN, \textit{supra} note 1, at 182.}

\textsuperscript{148} See Eggert \& Rolston, \textit{supra} note 13, at 163.

\textsuperscript{149} See \textit{id.} at 163–65.
motives, the Irish courts could not ignore the EU laws at issue in these cases. While the Court managed to get around them in Open Door, it could not stop the defendant clinics from appealing to the ECHR for a judgment. The High Court would not ignore EU law in the Grogan case; it referred the case to the ECJ.

Each attempt to enforce the Eighth Amendment and the ban on abortion information had EU law implications that eroded the effect of the Amendment. The ECJ’s ruling in Grogan warned Ireland that its treatment of access to abortion was subject to EU law as well as Irish law. The ECHR ruling in the Open Door case was a further setback to anti-abortion forces trying to protect Ireland from the availability of abortions. It served notice that Ireland could not pretend that its citizens were not availing themselves of abortion services in other countries. While the ruling did not override any conflicting decisions of the Irish courts, it did put pressure on them to follow it. Coming as it did shortly before the Irish referendum on the abortion amendments, it probably impacted both how the amendments were viewed and the vote itself.

The Open Door and Grogan cases strained the relationship between the EU and Ireland, a strain that was only exacerbated by the Attorney General v. X case. The Attorney General v. X decision was also affected by EU law and public pressure. The ECJ had already implied that Ireland could not restrict the right to travel for an abortion. When the High Court suggested that it could restrict travel under the pub-

154 See id. at 129.
155 See id. at 138–39.
157 See CASEY, supra note 22, at 349.
159 See Eggert & Rolston, supra note 13, at 166.
161 See Joined Cases 286/82 & 26/83, Luisi and Carbone v. Ministero del Tesoro, [1984] E.C.R. 377, 403. The Advocate General stated that under Article 59 of the Convention, “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 . . . and that . . . persons receiving medical treatment . . . are to be regarded as recipients of services.” Id.
lic policy exception, Irish, European and international opinion was brought to bear upon the Supreme Court. The public, and the government as well, could not abide an injunction that would prevent a young rape victim from having an abortion if other Irish women were able to use abortion clinics in England. This international pressure led the Supreme Court to lift the injunction.

The decision managed to sidestep EU law issues, but the controversy surrounding it brought Ireland’s abortion policies and their relationship to EU law to the forefront. Most significantly, it highlighted Protocol 17 of the Maastricht Treaty at a time when the Irish government wanted to focus on the economic benefits of a link with the EU. In order to ensure ratification of the Maastricht Treaty, the Irish government conceded the right to travel abroad for an abortion, and accepted that the right to information about the availability of abortions would have to conform with EU law.

The government was also compelled to promise a referendum on abortion issues. In an effort to gain the economic benefits of the EU, Ireland allowed its Constitution to be amended to reflect the freedom of information about services in Member States and the freedom to travel to use services in Member States. Most significantly, Ireland allowed its people to vote down a proposed amendment to restrict therapeutic abortions only to those cases in which the mother’s life, as opposed to her health, was in danger.

Ireland began negotiations for the Maastricht Treaty by attempting to shield its abortion laws from the liberalizing influence of EU law, but it eventually realized it could not separate the economic implications of belonging to the EU from its social policy on abortion. As a result of economic, social and political changes, the Irish government has moved steadily towards liberalizing abortion laws. The result for

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162 See O’Reilly, supra note 60, at 132–33; EP Row Over Irish Abortion Laws, supra note 61.
163 See O’Reilly, supra note 60, at 133; EP Row Over Irish Abortion Laws, supra note 61.
164 O’Reilly, supra note 60, at 133.
165 See id. at 134; van Wijnbergen, supra note 14, at 184.
166 See van Wijnbergen, supra note 14, at 183.
167 See Eggert & Rolston, supra note 13, at 168.
168 See id.
169 See id. at 169.
170 See id.
Ireland is a more liberal abortion policy that acknowledges and permits abortion tourism as a balance between the right to life of the unborn and the realities of modern society.\textsuperscript{173}

The Supreme Court's decision that the Abortion Information Act is constitutional puts Ireland one step nearer to legalizing abortion on demand in Ireland.\textsuperscript{174} Legalizing the publication of information about abortions makes it easier for all women to obtain one.\textsuperscript{175} With the restrictions eased and more women able to take advantage of abortion tourism, it may only be a matter of time before Ireland realizes that forcing women to go abroad for their abortions is an unnecessary hardship.\textsuperscript{176} While the Constitution gives Irish women a right to travel abroad to obtain an abortion, it does not give women the right to have an abortion abroad, so poor women cannot argue that their right to an abortion is infringed by the cost of going abroad.\textsuperscript{177} However, this argument could be used to sway public opinion in favor of legalized abortion for all in Ireland.

One Irish group is already publicly defying the restrictions on counseling that the Abortion Information Act allows.\textsuperscript{178} The Irish Family Planning Association stated that it would continue to make appointments for clients seeking abortions, despite the Act's prohibition against this.\textsuperscript{179} The Association believes the ECJ would support its position because the prohibition against doctors or counselors making appointments for women unduly burdens women who are incapable of making their own appointments.\textsuperscript{180} The prohibition appears to be illogical, in that doctors can discuss the consequences of remaining pregnant with a patient, can discuss her medical condition with another doctor, and can make an abortion appointment in Ireland for her if her life is in danger, but the doctor cannot make her an appointment for an abortion in another country.\textsuperscript{181} The Supreme Court held

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\item \textsuperscript{173} See Cole, supra note 16, at 141–42.
\item \textsuperscript{174} See O'Regan, supra note 9, at 4.
\item \textsuperscript{175} See Open Door Counselling v. Ireland, 15 E.H.R.R. 244, 267 (1992).
\item \textsuperscript{176} See Nuala O'Faolain, Abortion Debate was not Based on Rights, IRISH TIMES, May 22, 1995, at 14; O'Regan, supra note 9, at 4.
\item \textsuperscript{177} See Byrne & Binchy, supra note 3, at 205.
\item \textsuperscript{178} See Padraig O'Morain, IFPA Says it Will Continue to Make Abortion Appointments, IRISH TIMES, May 22, 1995, at 1.
\item \textsuperscript{179} See id.
\item \textsuperscript{180} See id.
\item \textsuperscript{181} See Alan Shatter, Despite Ruling, Troubled Waters Still Lie Ahead, IRISH TIMES, May 15, 1995, at 12.
\end{itemize}
such a restriction constitutional, but the ECJ could strike it down if it were challenged, which would further loosen restrictions.\textsuperscript{182}

The statistics on the 1992 abortion referendum show a great deal of support among the Irish for the right to have an abortion.\textsuperscript{183} The electorate not only voted to ease restrictions involving abortions abroad, but it also defeated a restriction on abortion in Ireland by a fairly large margin.\textsuperscript{184} Irish society also seems to be shifting towards individualism and cultural change.\textsuperscript{185} Half of the population is under the age of twenty-five, and these voters have indicated that they want a change from conventional party politics and the traditional restrictions on abortion.\textsuperscript{186} Public opinion polls show that most Irish citizens favor some form of legalized abortion, and the country's most popular politician, President Mary Robinson, is also in favor of a liberal agenda.\textsuperscript{187} With such a trend towards liberalization, it may not be long before Irish politicians follow it and vote to allow legalized abortion on demand.\textsuperscript{188}

Over the period of a decade pro-abortion groups were able to water down the Eighth Amendment to the point where women can obtain information about, and travel abroad for, an abortion.\textsuperscript{189} Each time anti-abortion groups tried to enforce the amendment it backfired because the EU was involved.\textsuperscript{190} While there will probably never be any real end to the abortion debate in Ireland, the ease of communication and travel between the EU makes it more likely that the present balance will eventually give way to abortion on demand in Ireland.\textsuperscript{191}

\section*{Conclusion}

Ireland amended its Constitution in 1983 to protect the right to life of the unborn. In the years that followed, anti-abortion forces in Ire-

\begin{itemize}
\item \textsuperscript{182} See O'Morain, supra note 178, at 1.
\item \textsuperscript{183} See Irish Move to the Left, supra note 5.
\item \textsuperscript{184} See id.
\item \textsuperscript{185} See Cooney, supra note 14, at 15. The legalization of divorce and homosexual acts, and the liberalization of laws permitting the sale of condoms support this. See id.; Introducing Divorce, supra note 143, at 15.
\item \textsuperscript{186} See William Tuohy, A Sea Change in Ireland, L.A. Times, Jan. 12, 1993, at 2. The young people were one reason Ireland's two major political parties both suffered severe losses in the general election held the same day as the abortion referendum. See id.
\item \textsuperscript{187} See O'Callaghan, supra note 60, at 34; Tuohy, supra note 186, at 2.
\item \textsuperscript{188} See Tuohy, supra note 186, at 2.
\item \textsuperscript{189} See Reid, supra note 19, at 37.
\item \textsuperscript{190} See Cole, supra note 16, at 114, 118.
\item \textsuperscript{191} See id. at 141-42; O'Faolain, supra note 176, at 14.
\end{itemize}
land used the amendment to stop the flow of women going to England and other countries for abortions. The courts supported this by prohibiting clinics from counseling pregnant women about abortion options and prohibiting student groups from publishing or distributing information about abortion clinics in England.

These attempts to prevent abortion tourism backfired and brought about greater reproductive freedoms. Ireland’s position in the EU made it impossible to impose restrictions that violated EU law. While the Irish courts tried to ignore implications of EU law when granting injunctions against the various groups, they still had to contend with the European courts of law and courts of public opinion. Both of these acted against the Irish courts and helped to bring about liberalizing changes in Irish abortion law.

The ECJ and the ECHR handed down decisions that made it clear Ireland did not have broad discretion to restrict the EU right to travel and the freedom of information if the restrictions violated the Treaty of Rome. These rulings did not actually change the law, but they warned Ireland that Article 56’s public policy exception would only go so far. Ireland did not have a chance to test these warnings before the Attorney General v. X case developed and changed the course of Irish abortion law and its relationship to the Maastricht Treaty.

Once the Attorney General v. X case aroused public opinion and brought the abortion issue and Protocol 17 to the forefront, there was no turning back: Ireland had to change its abortion policy. The Irish government was forced to concede and ask for the Solemn Declaration and the abortion referendum to create a coalition to ratify the Maastricht Treaty. The incentive to participate in the EU, along with the pressure exerted by the availability of abortions in other Member States, compelled Ireland to liberalize its abortion laws and officially recognize and sanction abortion tourism. With the Eighth Amendment essentially just a symbol, abortion on demand in Ireland may not be far away.

Abigail-Mary E.W. Sterling