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Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan: Irish Abortion Law and the Free Movement of Services in the European Community

Cathleen M. Colvin*

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Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan: Irish Abortion Law and the Free Movement of Services in the European Community

Cathleen M. Colvin

Abstract

This Comment argues that a ban on information regarding the availability of abortion in other Member States violates the Treaty by obstructing the free movement of services. Part I of this Comment examines the provision in Community law for the free movement of services and tracks the development of laws regulating abortion in Ireland and the Community. Part II discusses *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, in which the Court of Justice declined to address the validity of Ireland's ban on information regarding the availability of abortion services in England. Part III argues that the Court of Justice should have taken the opportunity to pronounce that this ban on information obstructs the free movement of services in violation of Community law. In addition, Part III discusses the failure of the Court of Justice to resolve the conflict between competing fundamental human rights. This Comment concludes that by permitting the injunction issued by the Irish Supreme Court, the Court of Justice has slowed the integration of the Community.

COMMENT

SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN (IRELAND) LTD. v. GROGAN: IRISH ABORTION LAW AND THE FREE MOVEMENT OF SERVICES IN THE EUROPEAN COMMUNITY

INTRODUCTION

The free movement of services is one of the fundamental pillars of the European Economic Community (the "Community").¹ The Treaty of Rome (the "Treaty") prohibits Member States from obstructing the freedom to provide services.² Sub-

1. Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 59-66, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty or Treaty] (providing for free exchange of services); *Cowan v. Le Trésor Public*, Case 186/87, [1989] E.C.R. 195, [1990] 2 C.M.L.R. 613 (noting free movement of services plays independent role as fundamental freedom). *But see* Commission White Paper on the Completion of the Internal Market, E.C. BULL. 6, at 18, 19 (1985) [hereinafter Comm'n White Paper] (noting slower progress in freedom to provide services, as opposed to goods, although distinction not valid and economic potential weakened by maintaining it).

2. EEC Treaty, *supra* note 1, arts. 3, 59-66. The Single European Act, O.J. L 169/1 (1987) [hereinafter S.E.A.], reaffirmed the European Economic Community's [hereinafter the Community] dedication to the free movement of services. Article 13 of the S.E.A. states that "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." *Id.* at 7.

The European Court of Justice [hereinafter Court of Justice] played a major role in implementing the objectives of the Treaty by developing the doctrines of direct effect and the primacy of Community law. The doctrine of direct effect provides that individuals may invoke certain Treaty articles in national courts without prior implementation in national law. *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1, 12, [1963] C.M.L.R. 105, 129. Treaty articles are directly effective where the Treaty imposes obligations "in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community." *Id.* at 13, [1963] C.M.L.R. at 130. Moreover, national courts must apply Community law directly, regardless of contrary national law. *Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585, 593-94, [1964] C.M.L.R. 425, 456.

The Court of Justice has held that Articles 59 and 60 are sufficiently precise to have direct effect. *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, Case 33/74, [1974] E.C.R. 1299, [1975] 1 C.M.L.R. 298 (finding first paragraph of Article 59 and third paragraph of Article 60 to have direct effect). For a discussion of direct effect in EEC law, see JOSEPHINE STEINER, *TEXTBOOK ON EEC LAW* 21-33 (2d ed. 1990).

The Court of Justice furthered the Treaty's goal of economic and social cohesion

sequent legislation specifically recognizes the right of any Community national to travel freely between Member States to receive services.³

In 1989, the Irish Supreme Court enjoined several student groups from distributing literature regarding the availability of abortion in England.⁴ The Supreme Court held that the distribution of such information violated the Irish constitutional proscription against abortion.⁵ The students argued that the injunction conflicted with the right to receive services under Community law and the right to impart information guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Human Rights Convention").⁶ Although the European Court of Justice (the

by asserting the primacy of Community law over prior and subsequent national law. *Costa*, [1964] E.C.R. at 593-94, [1964] C.M.L.R. at 456. In addition, the Court of Justice subsequently held that Community law takes precedence over all national law, including constitutional or fundamental rights. *Amministrazione delle Finanze dello Stato v. Simmenthal*, [1978] E.C.R. 629, [1978] 3 C.M.L.R. 263; *Internationale Handelsgesellschaft mbH v. Einfuhr-und-Vorratsstelle*, Case 11/70, [1970] E.C.R. 1125, 1134, [1972] C.M.L.R. 255, 283 [hereinafter IHG]. The *Simmenthal* Court stated that

[i]n accordance with the principle of the precedence of Community law, [Treaty provisions and legislation] not only by their entry into force render automatically inapplicable any conflicting provision of current national law but . . . also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.

Id. at 643-44, [1978] 3 C.M.L.R. at 283.

3. General Program for the Abolition of Restrictions on the Freedom to Provide Services, 2 J.O. 32 (1962), O.J. Eng. Spec. Ed. 1974 (IX), at 3 [hereinafter Service Program]; Council Directive 64/220, 56 J.O. 845 (1964), O.J. Eng. Spec. Ed. 1963-1964, at 115, updated by Council Directive 73/148, O.J. L 172/14 (1973) [hereinafter Service Directive] (recognizing freedom to receive services in another Member State as corollary to freedom to provide services guaranteed by Treaty).

4. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, 1989 I.R. 760 (Ir. S.C. 1989).

5. *Id.* at 764; see IR. CONST. art. 40.3.3. Article 40.3.3 [hereinafter Eighth Amendment] provides that "[t]he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." *Id.*

6. *Grogan*, 1989 I.R. at 761; see European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10, 213 U.N.T.S. 221 (1955) [hereinafter Human Rights Convention]. Article 10 of the Human Rights Convention states that

“Court of Justice”) recognized abortion as a service, it found that the students did not have standing to raise the issue of Ireland’s prohibition of the distribution of information about abortion services offered in other Member States.⁷ The Court, therefore, declined to address the compatibility of the ban with Community law. The Court of Justice based this finding mainly on the absence of a link between the students and the clinics in England that provide abortion services.⁸ Moreover, the Court failed to resolve the conflict between the right to expression guaranteed by the Human Rights Convention and the right to life of the fetus protected by the Irish Constitution.⁹

This Comment argues that a ban on information regarding the availability of abortion in other Member States violates the Treaty by obstructing the free movement of services. Part I of this Comment examines the provision in Community law for the free movement of services and tracks the development of laws regulating abortion in Ireland and the Community. Part II discusses *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*,¹⁰ in which the Court of Justice declined to address the validity of Ireland’s ban on information regarding the availability of abortion services in England. Part III argues that the Court of Justice should have taken the opportunity to pronounce that this ban on information obstructs the free movement of services in violation of Community law. In addition, Part III discusses the failure of the Court of Justice to resolve the conflict between competing fundamental human rights. This Comment concludes that by permitting the in-

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers

.....

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the prevention of disorder or crime, for the protection of health or morals, for the protection of the . . . rights of others . . .

Id. at 230.

7. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. —, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 581.

8. *Id.* at —, Common Mkt. Rep. (CCH) [1991] 2 CEC at 580.

9. *Id.*

10. *Id.*, Common Mkt. Rep. (CCH) [1991] 2 CEC 539.

junction issued by the Irish Supreme Court, the Court of Justice has slowed the integration of the Community.

I. SERVICE LAW AND ABORTION IN THE EUROPEAN ECONOMIC COMMUNITY

A. Free Flow of Services within the Community

The free movement of services is fundamental to the Community system.¹¹ Article 59 of the Treaty calls for the abolition of restrictions on the freedom to provide services.¹² A Member State may only derogate from Article 59 if necessary for the protection of an imperative public interest¹³ which cannot be protected by less restrictive measures.¹⁴ Moreover, any national restrictions must not unjustifiably discriminate based

11. See *supra* note 1 and accompanying text (discussing exchange of services as fundamental freedom).

12. EEC Treaty, *supra* note 1, art. 59. Article 59 provides that [w]ithin the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.

Id.

The subsequent articles in the services section of the Treaty provide for implementation of Articles 59 and 60. EEC Treaty, *supra* note 1, arts. 61-66. Article 61 relates to the freedom to provide services in the field of transport, and is not relevant to the present discussion. Article 62 serves as the standstill clause that prohibits Member States from introducing "any new restrictions on the freedom to provide services which have in fact been attained at the date of the entry into force of [the] Treaty." Article 63 governs the proposal and implementation of an interim program and directives as a means to ensure the free flow of services. Article 64 declares the Member States' readiness to "undertake the liberalization of services beyond the extent required by the directives" where possible. Where restrictions on services have not yet been abolished, Article 65 prohibits distinctions based on nationality or residence of the person providing the service. Finally, Article 66 provides that Articles 55 to 58, which qualify the rights granted by Treaty articles, apply to services as well. See EEC Treaty, *supra* note 1, arts. 61-66.

13. *Commission v. Germany*, Case 205/84, [1986] E.C.R. 3755, 3803, [1987] 2 C.M.L.R. 69, 148 [hereinafter *German Insurance*]; see *In re Webb*, Case 279/80, [1981] E.C.R. 3305, 3325, [1982] 1 C.M.L.R. 719, 736. The Court of Justice stated that "the freedom to provide services is one of the fundamental principles of the Treaty and may be restricted only by provisions which are justified by the general good" and which are imposed equally on all persons in the Member State. *Id.*

14. *German Insurance*, [1986] E.C.R. at 3803, [1987] 2 C.M.L.R. at 148.

on the nationality or residence of the providers of services.¹⁵

An activity qualifies as a service under the Treaty if it satisfies the two requirements of Article 60.¹⁶ First, the activity must normally be provided for remuneration.¹⁷ The Court of Justice defined remuneration as consideration for a service which is normally agreed upon between the provider and the recipient.¹⁸ The transaction need not be predetermined, however, and the amount paid may be minimal.¹⁹ Second, to qualify as a service, the activity must fit into one of the categories delineated in Article 60.²⁰ For example, the Court of Justice

15. *Id.*; *Bond van Adverteerders v. Netherlands*, Case 352/85, [1988] E.C.R. 2085, 2134, [1989] 3 C.M.L.R. 113, 151. In *Bond*, the Court stated that "[n]ational rules which are not applicable to services without distinction as regards their origin and which are therefore discriminatory are compatible with Community law only if they can be brought within the scope of an express derogation." *Id.*; see EEC Treaty, *supra* note 1, art. 7 (prohibiting discrimination). *But cf. Regina v. Saunders*, Case 175/78, [1979] E.C.R. 1129, [1979] 2 C.M.L.R. 216 (finding that penal measure which confines national to particular area of her own Member State is purely national measure that falls outside scope of Treaty).

16. EEC Treaty, *supra* note 1, art. 60. Article 60 provides that [s]ervices shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include:

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

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Id.

17. *Id.*

18. *Belgium v. Humbel*, Case 263/86, [1988] E.C.R. 5365, [1989] 1 C.M.L.R. 393. Services provided by the state for the benefit of its citizens, rather than for profit, do not meet the Article 60 requirements. *Id.* at 5388, [1989] 1 C.M.L.R. at 405. In *Humbel*, a French boy living with his family in Luxembourg questioned the fee he was obliged to pay to attend school as a foreign student. *Id.* at 5385, [1989] 1 C.M.L.R. at 403. Luxembourg nationals did not have to pay the fee. *Id.* The Court held that the element of remuneration was not present in the case because the school was part of the national education system and was funded by the state. *Id.* at 5388, [1989] 1 C.M.L.R. at 405. See generally STEINER, *supra* note 2, at 200-201 (discussing right to receive services in Community).

19. *Cowan v. Le Trésor Public*, Case 186/87, [1989] E.C.R. 195, [1990] 2 C.M.L.R. 613 (finding that tourist who used metro qualified as recipient of service).

20. EEC Treaty, *supra* note 1, art. 60; see *supra* note 16 (listing categories).

recognizes medical care as a service because it fits within the "activities of the professions" category.²¹ Finally, Article 60 specifies that Article 59 is not relevant when a particular activity is protected by other Treaty provisions.²² Where other provisions do not apply, however, Article 59 guarantees that no economic activity is denied the protection of Community law.²³

1. Freedom to Receive Services

From the outset, legislation implementing the free movement of services recognized the right to receive services.²⁴ The Community initially provided for the free movement of services through the General Programme for the Abolition of Restrictions on the Freedom to Provide Services (the "Services Program").²⁵ The Services Program specified that indirect restrictions on services, such as the obstruction of the recipient of services, must be abolished.²⁶ Subsequently, Council Directive 64/220 (the "Service Directive") required Member States to abolish restrictions on Community nationals who wished to travel to another Member State to receive services.²⁷

To qualify for Treaty protection as the recipient of a ser-

21. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. —, *Common Mkt. Rep. (CCH)* [1991] 2 CEC 539, 579 (finding termination of pregnancy is service); *Luisi and Carbone v. Ministero del Tesoro*, Joined Cases 286/82 & 26/83, [1984] E.C.R. 377, 408, [1985] 3 C.M.L.R. 52, 82 (finding medical care is service).

The Court of Justice recognizes many other activities as services under Article 60. *See, e.g.*, *Bond Van Adverteerders v. Netherlands*, Case 352/85, [1988] E.C.R. 2085, 2132, [1989] 3 C.M.L.R. 113, 151 (broadcasting); *Commission v. Germany*, Case 427/85, [1988] E.C.R. 1123, 1167, [1989] 2 C.M.L.R. 677, 710 (legal activity); *Knors v. Secretary of State*, Case 115/78, [1979] E.C.R. 399, 411, [1979] 2 C.M.L.R. 357, 367 (plumbing and heating); *Ministère Public v. Van Wesemael*, Joined Cases 110 & 111/78, [1979] E.C.R. 35, 55, [1979] 3 C.M.L.R. 87, 111 (employment agencies for entertainers); *Dona v. Mantero*, Case 13/76, [1976] E.C.R. 1333, 1342, [1976] 2 C.M.L.R. 578, 588 (professional sports); *Ex parte Sacchi*, Case 155/73, [1974] E.C.R. 409, 431, [1974] 2 C.M.L.R. 177, 205 (television broadcasting and advertising).

22. EEC Treaty, *supra* note 1, art. 60.

23. *See Ernst Steindorff, Freedom of Services in the EEC*, 11 *FORDHAM INT'L L.J.* 347, 365 (1988).

24. Service Program, *supra* note 3, O.J. Eng. Spec. Ed. 1974 (IX), at 3; *see* Service Directive, *supra* note 3, O.J. Eng. Spec. Ed. 1963-1964, at 115; *see also* Steindorff, *supra* note 23, at 355-57.

25. Services Program, *supra* note 3, O.J. Eng. Spec. Ed. 1974 (IX), at 3.

26. *Id.*

27. Service Directive, *supra* note 3, O.J. Eng. Spec. Ed. 1963-1964, at 115.

vice, a Community national must travel to another Member State for the purpose of receiving a service²⁸ and stay for a limited time.²⁹ For example, the Court recognizes tourists as recipients of services because they plan to remain for a short time, and intend to receive services in the host country.³⁰ Workers, in contrast, are not considered recipients because their stay is indefinite and their intention is to work in the host country, not to receive services there.³¹

The Court of Justice also recognizes rights corollary to the freedom to receive services.³² In *Luisi and Carbone v. Ministero del Tesoro*,³³ Mr. Luisi and Ms. Carbone were fined for exporting amounts of Italian currency exceeding the legal limit provided by Italian law.³⁴ They admitted to exporting the money to pay for medical services and tourism in other Member States.³⁵ They claimed, however, a right to export currency as a corollary to the right to receive services under Article 59.³⁶ The Court of Justice recognized that without corollary rights that enable individuals to receive services, Article 59 would be rendered meaningless.³⁷ The Court held that the right to ex-

28. *Italy v. Watson*, Case 118/75, [1976] E.C.R. 1185, 1198, [1976] 2 C.M.L.R. 552, 572 (finding that Italy could require U.K. national who entered Italy to work as *au père* to register with state).

29. *Steymann v. Staatssecretaris van Justitie*, Case 196/87, [1988] E.C.R. 6159, 6175, [1989] 1 C.M.L.R. 449, 456. Mr. Steymann was a German national who lived on a religious commune in the Netherlands. *Id.* at 6170, [1989] 1 C.M.L.R. at 454. He provided plumbing and other services for the commune in exchange for food, clothing and lodging. *Id.* Mr. Steymann sued the administrative agency responsible for denying his residency permit, relying on the Treaty provisions guaranteeing the free exchange of services. *Id.* at 6174, [1989] 1 C.M.L.R. at 455. He claimed that as a provider and recipient of services, he was entitled to residency. *Id.* The Court of Justice denied his claim noting that Articles 59 and 60 do not apply when the stay is permanent or of indefinite duration. *Id.* at 6175, [1989] 1 C.M.L.R. at 455.

30. *Cowan v. Le Trésor Public*, Case 186/87, [1989] E.C.R. 195, 220-221, [1990] 2 C.M.L.R. 613, 631; *Luisi and Carbone v. Ministero del Tesoro*, Joined Cases 286/82 & 26/83, [1984] E.C.R. 377, 408, [1985] 3 C.M.L.R. 52, 82.

31. *Steymann*, [1988] E.C.R. at 6175, [1989] 1 C.M.L.R. at 456. *But see* EEC Treaty, *supra* note 1, arts. 48-51 (providing for free movement of workers).

32. *Cowan*, [1989] E.C.R. at 221, [1990] 2 C.M.L.R. at 631 (finding protection from harm in Member State to which person travels to receive services is corollary to free movement of services); *Luisi and Carbone*, [1984] E.C.R. at 401, [1985] 3 C.M.L.R. at 76 (finding right to export capital corollary to right to receive services).

33. [1984] E.C.R. 377, [1985] 3 C.M.L.R. 52.

34. *Id.* at 397-98, [1985] 3 C.M.L.R. at 74.

35. *Id.* at 398, [1985] 3 C.M.L.R. at 74.

36. *Id.* They also claimed a right to export capital based on Article 106. *Id.*

37. *Id.* at 403, [1985] 3 C.M.L.R. at 78.

port money to pay for services is a necessary corollary to the right to receive services in other Member States, to the extent that the underlying service had been liberalized.³⁸

In *GB-INNO-BM v. Confédération du Commerce Luxembourgeois* (“*GB-INNO*”),³⁹ the Court of Justice recognized access to information to be an essential corollary to the free movement of goods.⁴⁰ The Court held that a Luxembourg law prohibiting the listing of discount prices available in Belgium to be incompatible with Community law because blocking information available to the consumer obstructed the free movement of goods in violation of the Treaty.⁴¹ The free movement of goods, the Court noted, must include the free movement of consumers to buy those goods.⁴² The Court observed that Community policy establishes a “close link” between consumer protection and access to information.⁴³ Moreover, the Court found that the provision of information to the consumer is “one of the principle requirements” of the free movement of goods under Community law.⁴⁴ The Court concluded that national laws that deny the consumer access to information, such as advertisements of discount prices available in other Member States, cannot be justified under the Treaty.⁴⁵

This holding regarding the exchange of goods can be applied by analogy to the exchange of services.⁴⁶ As Advocate General Van Gerven noted in *Grogan*,

[i]n the judgement of *GB-INNO*, the court emphasized, in

38. *Id.* at 408, [1985] 3 C.M.L.R. at 82.

39. Case C-362/88, [1990] E.C.R. 667, [1991] 2 C.M.L.R. 801 [hereinafter *GB-INNO*].

40. *GB-INNO*, [1990] E.C.R. 689, [1991] 2 C.M.L.R. 801, 816.

41. *Id.*

42. *Id.* at 686, [1991] 2 C.M.L.R. at 814.

43. *Id.* at 687, [1991] 2 C.M.L.R. at 815. In *Grogan*, the Court of Justice used the “link” language of *GB-INNO* to create a new requirement for a “link” between the economic operator and the publisher. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. __, __, Common Mkt. Rep. (CCH) [1991] 2 CEC 577, 579 (stating “[i]t is undisputed that the [students] had no links with clinics in another member state.”); see *infra* notes 186-93 and accompanying text (discussing the *Grogan* “link” theory).

44. *GB-INNO*, Case C-362/88, [1990] E.C.R. 667, 689, [1991] 2 C.M.L.R. 801, 816.

45. *Id.*

46. See Comm’n White Paper, *supra* note 1, at 18-19 (noting invalidity of distinctions between goods and services); see also Opinion of Advocate General Van Gerven, *Grogan*, [1991] E.C.R. at __, Common Mkt. Rep. (CCH) [1991] 2 CEC at 560.

connection with offering goods for sale, the interest of consumer information. It stated that consumers' freedom to shop in another member state is compromised if they are deprived of access in their own country to advertising available in the country where purchases are made. I can see no reason why the position should be otherwise with regard to information provided about a service⁴⁷

2. Derogation from the Treaty

The Treaty provides for derogation from the guarantee of free movement of services in certain circumstances.⁴⁸ One circumstance under which a Member State may derogate from Article 59 is where an imperative public policy is threatened.⁴⁹ However, the Court of Justice interprets strictly the scope and meaning of the Service Directive's provisions for a derogation based on public policy.⁵⁰ The Court has recognized three requirements for a valid public policy derogation. First, the restriction proposed must be "objectively justified"⁵¹ to protect

47. Opinion of Advocate General Van Gerven, *Grogan*, [1991] E.C.R. at —, Common Mkt. Rep. (CCH) [1991] 2 CEC at 560.

48. EEC Treaty, *supra* note 1, art. 56 (applying to exchange of services pursuant to Article 66). Even where a restrictive measure does not meet the requirements of Article 56, the Treaty provides another method for derogation from Article 59. EEC Treaty, *supra* note 1, art. 55. The Council may elect to remove certain activities entirely from the sphere of services protected by Article 59. *Id.* This procedure has never been used, and many scholars consider it obsolete. Steindorff, *supra* note 23, at 401 (citations omitted).

49. EEC Treaty, *supra* note 1, art. 56; German Insurance, Case 205/84, [1986] E.C.R. 3755, 3808, [1987] 2 C.M.L.R. 69, 102. The three bases for derogation from Article 59 are public policy, public security, and public health. *Id.*; see Council Directive 64/221, 56 J.O. 850 (1964), O.J. Eng. Spec. Ed. 1963-1964 (IX), at 117. The public health derogation can only be used regarding specific disabilities, diseases, and disorders listed in the directive's annex. *Id.* at 119. The public security derogation is not relevant to the present discussion.

50. *Van Duyn v. Home Office*, Case 41/74, [1974] E.C.R. 1337, 1350, [1975] 1 C.M.L.R. 1, 17. The *Van Duyn* Court found that the concept of public policy must be interpreted strictly: "[I]ts scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community." *Id.* Although *Van Duyn* concerned Treaty provisions regarding the free movement of workers, as the Court of Justice indicated, provisions regarding services and workers "are based on the same principles both in so far as they concern the entry into and residence in the territory of Member States." *Italy v. Watson*, Case 118/75, [1976] E.C.R. 1185, 1197, [1976] 2 C.M.L.R. 552, 570.

51. *Van Binsbergen v. Bedrijfsvereniging Metaalnijverheid*, Case 33/74, [1974] E.C.R. 1299, 1310, [1975] 1 C.M.L.R. 298, 313.

an imperative public policy interest.⁵² Second, the means used to protect the public policy must be proportional to the end sought.⁵³ Third, the prohibition must not discriminate on the basis of nationality or residence.⁵⁴

To determine the clarity and importance of the public policy objective, the Court of Justice examines several factors. A law prohibiting the activity may evidence a public policy concern that justifies the derogation from the Treaty.⁵⁵ For example, the United Kingdom had a law that prohibited retailers from selling certain goods on Sundays.⁵⁶ A French retailer with shops in the United Kingdom argued that the law obstructed the free movement of goods in violation of the Treaty.⁵⁷ The Court of Justice stated that the United Kingdom had a legitimate public policy aim of arranging working and non-working hours in accordance with "national or regional

52. *German Insurance*, [1986] E.C.R. at 3808, [1987] 2 C.M.L.R. at 102; *Rutili v. Minister for the Interior*, Case 36/75, [1975] E.C.R. 1219, 1231, [1976] 1 C.M.L.R. 140, 155 (requiring "genuine and sufficiently serious threat to public policy" to justify derogation).

53. *Bond Van Adverteerders v. Netherlands*, Case 352/85, [1988] E.C.R. 2085, 2135, [1989] 3 C.M.L.R. 113, 151.

54. *Id.* at 2134, [1989] 3 C.M.L.R. at 152; *Adoui and Cornuaille v. Belgian State and City of Liège*, Case 116/81, [1982] E.C.R. 1665, 1712, [1982] 3 C.M.L.R. 631, 665 (finding Belgium could not exclude French nationals on basis that prostitution violated public policy where same standard was not applied to Belgian prostitutes); *Rutili*, [1975] E.C.R. at 1236-37, [1976] 1 C.M.L.R. at 158-59 (finding that France could only impose restrictions on Italian union activist residing in France where such restriction could also be imposed on French national).

55. *Regina v. Henn*, Case 34/79, [1979] E.C.R. 3795, 3817, [1980] 1 C.M.L.R. 246, 275 (holding that while ban on import of certain pornographic materials violated Treaty provisions regarding free flow of goods, it was justified to protect public morality where there was no legal trade in goods in United Kingdom). *But see* *Conegate, Ltd. v. H.M. Customs and Excise*, Case 121/85, [1986] E.C.R. 1007, 1025, [1986] 1 C.M.L.R. 739, 756 (holding that United Kingdom could not exclude sexually explicit inflatable dolls based on public morality where a legal trade in the dolls existed within United Kingdom). The activity sought to be restricted does not have to be illegal, however, in order to meet public policy requirements. For example, the Court of Justice allowed the United Kingdom to exclude a practitioner of Scientology, even though the practice of Scientology was not illegal in the United Kingdom. *Van Duyn v. Home Office*, Case 41/74, [1974] E.C.R. 1337, 1350-51, [1975] 1 C.M.L.R. 1, 17. The Court stated that an administrative measure that expressed the United Kingdom's belief that the activity is socially undesirable was sufficient to justify a derogation. *Id.* at 1351, [1975] 1 C.M.L.R. at 17.

56. *See* *Torfaen Borough Council v. B & Q plc*, Case C-145/88, [1989] E.C.R. 3851, 3886, [1990] 1 C.M.L.R. 337, 362.

57. *Id.* at 3887, [1990] 1 C.M.L.R. at 362.

socio-cultural characteristics.”⁵⁸

Moreover, the Court of Justice requires that to resort to the public policy derogation a Member State must show that the perceived threat to public policy affects one of the fundamental interests of society⁵⁹ and is “necessary for the protection of those interests in a ‘democratic society.’”⁶⁰ Thus, in *Adoui and Cornuaille v. Belgian State and City of Liège*,⁶¹ Belgium was prevented from using the public policy derogation to exclude two French prostitutes while at the same time allowing Belgian nationals to practice prostitution.⁶² Allowing Belgian nationals to engage in the activity undercut Belgium’s claim that it had a clear and important public policy against prostitution.⁶³

The second requirement for a public policy derogation is that the means employed to implement the policy be “proportional” to the public policy goal.⁶⁴ The proportionality doctrine states that only the least restrictive means available may be used to achieve a Member State’s valid policy objective.⁶⁵ Thus, Germany could not cite public policy or public health

58. *Id.* at 3889, [1990] 1 C.M.L.R. at 364.

59. *Rutili v. Minister for the Interior*, Case 36/75, [1975] E.C.R. 1219, 1232, [1976] 1 C.M.L.R. 140, 155 (referring to rights guaranteed by Human Rights Convention).

60. *Id.*; see *Regina v. Bouchereau*, Case 30/77, [1977] E.C.R. 1999, 2014, [1977] 2 C.M.L.R. 800, 825. In *Bouchereau*, the Court stated that

[i]n so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence . . . of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.

Id.

61. Joined Cases 115 & 116/81, [1982] E.C.R. 1665, [1982] 3 C.M.L.R. 631.

62. *Id.* at 1707-08, [1982] 3 C.M.L.R. at 662.

63. *Id.*; see *Conegate, Ltd. v. H.M. Customs & Excise*, Case 121/85, [1986] E.C.R. 1007, [1986] 1 C.M.L.R. 734 (finding that United Kingdom did not prove imperative policy interest in banning pornographic material because same items could circulate in certain parts of country).

64. *Bond van Adverteerders v. Netherlands*, Case 352/85, [1988] E.C.R. 2085, 2134, [1989] 3 C.M.L.R. 113, 151. In *Bond*, the Court stated that “[a]s an exception to a fundamental principle of the Treaty, Article 56 of the Treaty must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard.” *Id.* at 2135, [1989] 3 C.M.L.R. at 151.

65. See *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, [1979] E.C.R. 649, 664, [1979] 3 C.M.L.R. 494, 509-10 [hereinafter *Cassis de Dijon*].

concerns to exclude a French liqueur that had an alcoholic content lower than that of its German counterpart.⁶⁶ In this instance, appropriate labelling would have been a less restrictive means of meeting Germany's policy objective of consumer protection.⁶⁷

The third requirement for a valid public policy derogation is that the obstructive action not unjustifiably discriminate against services offered by other Member States.⁶⁸ Even well-tailored means used to protect a clear public policy must not discriminate on the basis of nationality.⁶⁹ In *Luisi and Carbone*, for example, Italy had created an obstacle to the freedom of its nationals to travel and receive medical services in other Member States, but it had created no similar difficulty for its nationals receiving the same services in Italy.⁷⁰ This restriction could grant a commercial advantage to Italian medical services because Italians seeking expensive procedures would be forced to use domestic medical services. Though Italy had a clear interest in slowing capital flight, and limiting currency export was a proportional means to accomplish this end, the law's discriminatory effect rendered the public policy argument ineffective to justify derogation from the Treaty.⁷¹

The Court of Justice asserts that covert as well as overt discrimination violates Articles 59 and 60.⁷² Thus, discrimina-

66. *Id.*

67. *Id.* For a case discussing the proportionality doctrine in the area of services, see *Bond*, [1988] E.C.R. at 2134, [1989] 3 C.M.L.R. at 151. In *Bond*, the Court held that the Netherlands' total ban on certain advertising subtitling, based on the policy objective of limiting the commercialization of the media, was inappropriate. *Id.* at 2135, [1989] 3 C.M.L.R. at 151. The Court noted several methods by which the cable programming industry could be regulated that were less restrictive than a total ban. *Id.*

68. *See id.* at 2134, [1989] 3 C.M.L.R. at 151. Neither the host Member State nor the home Member State may block the recipient or the provider of services. *Id.* at 2136, [1989] 3 C.M.L.R. at 152; *see also Luisi and Carbone v. Ministero del Tesoro*, Joined Cases 286/82 & 26/83, [1984] E.C.R. 395, 401, [1985] 3 C.M.L.R. 52, 77. *But see Procureur du Roi v. Debauve*, Case 52/79, [1980] E.C.R. 833, [1981] 2 C.M.L.R. 362 (finding that in absence of harmonization of field, each Member State can regulate or prohibit television advertising).

69. *Luisi and Carbone*, [1984] E.C.R. at 406, [1985] 3 C.M.L.R. at 81.

70. *Id.* at 398, [1985] 3 C.M.L.R. at 74.

71. *Id.* at 408, [1985] 3 C.M.L.R. at 82.

72. *Commission v. Ireland*, Case 61/77, [1978] E.C.R. 417, 450, [1978] 2 C.M.L.R. 466, 517. *But see Groener v. Minister for Education and City of Dublin Vocational Education Committee*, Case 379/87, [1989] E.C.R. 3967, 3994, [1990] 1

tion which is based on apparently neutral criteria, but which has a discriminatory effect, is prohibited.⁷³ For example, Ireland passed a law banning all boats over a certain size from fishing its waters.⁷⁴ Ireland's fishing fleet had no boats of the prohibited size.⁷⁵ The effect of the law, therefore, was to ban boats from other Member States while providing an advantage to the Irish fleet.⁷⁶ The law, neutral on its face, covertly discriminated on the basis of nationality and was thus declared invalid as contrary to Community law.⁷⁷

The Court of Justice further considered proportionality and discrimination in cases regarding bans on advertising. In *Procureur du Roi v. Debauve*,⁷⁸ the Court held that a ban on advertising by cable operators was not contrary to the Treaty's provisions on services. The Court said that the ban was not disproportionate because it was "relatively ineffective."⁷⁹ The ban did not discriminate because foreign broadcasters could still broadcast in natural reception zones.⁸⁰ Insofar as the area was not harmonized, Article 59 did not preclude the prohibition on advertising by cable television, as long as the rule applied without distinction to nationality or residence.⁸¹ Subsequently, in *Bond Van Adverteerders v. Netherlands*⁸² the Court held that despite the Netherlands' interest in maintaining the "non-commercial," "pluralistic" nature of their broadcasting system, it could not justify a similar ban on foreign cable operators.⁸³

C.M.L.R. 401, 415 (upholding Ireland's requirement that teachers able to speak Gaelic receive preference in hiring).

73. *Ireland*, [1978] E.C.R. at 450, [1978] 2 C.M.L.R. at 517. However, an activity need not be discriminatory to violate the Treaty. See *Cassis de Dijon*, Case 120/78, [1979] E.C.R. 649, [1979] 3 C.M.L.R. 494. The Court of Justice held that where a measure unjustifiably obstructs the free movement of goods or services, the activity cannot be compatible with the Treaty, even absent a discriminatory effect. *Id.*

74. *Ireland*, [1978] E.C.R. at 440-41, [1978] 2 C.M.L.R. at 509-10.

75. *Id.* at 449, [1978] 2 C.M.L.R. at 516.

76. *Id.*

77. *Id.* at 450-52, [1978] 2 C.M.L.R. at 516-17.

78. Case 52/79, [1980] E.C.R. 833, [1981] 2 C.M.L.R. 362.

79. *Id.* at 859-60, [1981] 2 C.M.L.R. at 396. Natural reception zones permitted television advertising to reach Belgium. *Id.*

80. *Id.*

81. *Id.* at 859, [1981] 2 C.M.L.R. at 396.

82. Case 352/85, [1988] E.C.R. 2085, [1989] 3 C.M.L.R. 113.

83. *Id.* at 2135, [1989] 3 C.M.L.R. at 151.

3. Fundamental Rights in Community Law

In addition to enforcing adherence to specific provisions of the Treaty, the Court of Justice may examine the compatibility of a national law with the general principles of fundamental rights and freedoms.⁸⁴ The Court has consistently held that fundamental rights form an integral part of Community law.⁸⁵ The Court is bound to safeguard these rights, and cannot uphold national measures that are incompatible with them.⁸⁶

To determine what constitutes a fundamental right, the Court of Justice considers the "constitutional traditions common to the Member States" as well as international treaties signed by the Member States.⁸⁷ The Court attaches "special

84. See, e.g., *Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] E.C.R. 3727, 3744-45, [1980] 3 C.M.L.R. 42, 64 (finding viticulturist with right to property claim based on German Constitution nevertheless may be prohibited by Community law from planting additional vines); *Rutili v. Minister for the Interior*, Case 36/75, [1975] E.C.R. 1219, 1236, [1976] 1 C.M.L.R. 140, 158; *Nold v. Commission*, [1974] E.C.R. 491, 507, [1974] 2 C.M.L.R. 338, 354; *IHG*, Case 11/70, [1970] E.C.R. 1125, 1134, [1972] C.M.L.R. 255, 283.

In *Rutili*, the Court of Justice emphasized that "an appraisal of whether measures designed to safeguard public policy must have regard to all Community law," including Article 10 of the Human Rights Convention. *Rutili*, [1975] E.C.R. at 1236, [1976] 1 C.M.L.R. at 158. The Court stated that no restrictions based on public policy shall be placed on the rights guaranteed by that article other than those which are justified by the interests in a democratic society. *Id.*; see Joseph Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1105 (1986).

85. See, e.g., *Hauer*, [1979] E.C.R. at 3744-45, [1980] 3 C.M.L.R. at 64; *Rutili*, [1975] E.C.R. at 1232, [1976] 1 C.M.L.R. at 151; *Nold*, [1974] E.C.R. at 507, [1974] 2 C.M.L.R. at 354; *IHG*, [1970] E.C.R. at 1134, [1972] C.M.L.R. at 283; see also Brian Walsh (Judge of Irish Supreme Court), *Reflections on the Effects of Membership of the European Communities in Irish Law*, in *DU DROIT INTERNATIONAL AU DROIT DE L'INTÉGRATION*, 805, 816 (F. Capotorti et al. eds., 1986) (quoting 1976 statement by Judge Pescatore that guarantee of fundamental rights is integral part of general principles of Community law). Judge Pescatore urged a common approach by the Community to fundamental rights, noting that "[a]ny attempt, at national level, to impose this protection unilaterally will inevitably result in weakening the Community system and destroy its unity. And . . . it is not in the interests of our States." *Id.* at 817.

86. *Nold*, [1974] E.C.R. at 507, [1974] 2 C.M.L.R. at 354.

87. S.E.A., *supra* note 2, O.J. L 169/1, at 1 (1987); see *Nold*, [1974] E.C.R. at 507, [1974] 2 C.M.L.R. at 354; *IHG*, [1970] E.C.R. at 1134, [1972] C.M.L.R. at 283.

The precise definition of "traditions common to" the Member States has not been determined. The minimalist interpretation asserts that only rights that exist in all Member States can be considered common to them. See STEINER, *supra* note 2, at 46. The maximalist approach points out that to avoid conflicts between the Community and all the Member States, any human right recognized in any Member State must be reflected in Community law. *Id.* It is important to note that the S.E.A.

significance" to the Human Rights Convention, which is expressly recognized in the preamble to the Single European Act.⁸⁸ The provisions of the Human Rights Convention do not have direct effect in the Member States; rather, the Court of Justice uses them to help determine general principles that it may then apply.⁸⁹ The Court may only apply these general principles of fundamental rights to cases within the scope of the Treaty.⁹⁰ The Court does not have the power to examine the validity of purely national measures under the Human Rights Convention.⁹¹

B. *The Development of Abortion Legislation in Ireland and in the Community*

Abortion has been prohibited in Ireland for centuries. While Europe and the United States have liberalized abortion laws, Ireland has maintained a total ban. In 1983, Ireland passed the Eighth Amendment to its Constitution, which the

passed in Ireland by referendum, and thereby became part of the Constitution. See Walsh, *supra* note 85, at 820. The population passed the referendum with full knowledge of the possible implications to Irish law, and amid much commentary and political debate warning that the passage of the S.E.A. could lead to the legalization of abortion even within Ireland's borders. *Id.* at 814-15.

88. S.E.A., *supra* note 2, O.J. L 169/1, at 1 (1987); Opinion of Advocate General Van Gerven, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. —, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 567. Ireland is a party to the Human Rights Convention, but the Convention was not incorporated into Irish domestic law. See JAMES CASEY, *CONSTITUTIONAL LAW IN IRELAND* 172 (1987). Therefore, a party cannot rely on the Convention in Irish courts. *Id.* However, the passage of the S.E.A. incorporates the Human Rights Convention into Ireland's domestic law, where Community law is implicated, almost as if it had been directly enacted into Irish domestic law. See John Temple Lang, *European Community Law, Irish Law and the Irish Legal Profession: Protection of the Individual and Co-Operation Between the Member States and the Community*, 5 DUBLIN U. L.J. 1, 3 (1983); see also, CASEY, *supra*, at 177-78.

89. See Lang, *supra* note 88, at 2-3; see also *Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] E.C.R. 3727, [1980] 3 C.M.L.R. 42 (finding Community law overrides national constitutional provision); *Minister for Fisheries v. Schoenberg*, Case 88/77, [1978] E.C.R. 473, 490, [1978] 2 C.M.L.R. 519, 525 (holding Article 7 of Treaty, prohibiting discrimination based on residence or nationality, to have direct effect). *But see* STEINER, *supra* note 2, at 31 (noting inconsistencies in Court of Justice's case law regarding direct effect of international agreements).

90. *Demirel v. Stadt Schwäbisch Gmünd*, Case 12/86, [1987] E.C.R. 3719, 3754, [1989] 1 C.M.L.R. 421, 440-41.

91. *Id.* The Court stated that it "has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law." *Id.*

Irish Supreme Court interpreted as providing more rigid prohibitions not only against abortion, but against information regarding abortion.⁹²

1. Early History of Ireland's Laws Restricting Abortion

Abortion has long been outlawed in Ireland. At common law, abortion was a misdemeanor.⁹³ In 1803, the United Kingdom enacted a statute, which applied to Ireland, that imposed the death penalty on one who administered poison with the intent to induce the miscarriage of a pregnant woman.⁹⁴ In 1861, the United Kingdom passed the Offenses Against the Person Act,⁹⁵ which substantially continues in force in Ireland today.⁹⁶ Section 58 of the Offenses Against the Person Act makes it a felony for a woman to attempt to induce her own miscarriage, or for anyone to perform an abortion on her.⁹⁷ Under section 59, anyone who supplies the means to terminate

92. IR. CONST. art. 40.3.3; *see infra* notes 129-39, 163-76 and accompanying text (discussing cases in which Irish Supreme Court interpreted Eighth Amendment strictly).

93. *See* Attorney General *ex rel.* Society for the Protection of Unborn Children (Ireland) Ltd. v. Open Door Counselling Ltd., 1988 I.R. 593, 597 (Ir. H. Ct.). The common law prohibition applied when the fetus had "quickened" in the uterus. *Id.*; *see* John Quinlan, Note, *Right to Life of the Unborn—An Assessment of the Eighth Amendment to the Irish Constitution*, 1984 B.Y.U. L. REV. 371, 371-72.

94. 43 Geo. 3, ch. 58 (1803) (Eng.). The statute also provided that one who administered the abortifacient with the intent to induce the miscarriage of any woman, whether or not she was actually pregnant, was guilty of a felony punishable by imprisonment or transportation for fourteen years. *Id.*

95. 24 & 25 Vict., ch. 100, §§ 58-59 (1861) (Eng.). The Act specified that it applied to Ireland. *Id.*

96. *See* BRIAN DOOLAN, CONSTITUTIONAL LAW AND RIGHTS IN IRELAND 2 n.3 (1984). The Irish Free State was founded in 1921, and the first Constitution was established one year later. *Id.* The present Constitution was approved by plebiscite in 1937. *Id.* at 2-4. The Offenses Against the Person Act did not conflict with the Irish Constitution and was never repealed. *See* Quinlan, *supra* note 93, at 372.

97. Offenses Against the Person Act, 24 & 25 Vict., ch. 100, § 58 (1861). Section 58 of the Act provides that

[e]very 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 the Intent to procure the Miscarriage of any Woman, whether she be or not with Child, shall [administer to her anything with 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 . . . or to be imprisoned for any term not exceeding Two Years.

Id.

a pregnancy knowing it will be used for that purpose is guilty of a misdemeanor.⁹⁸ There have been, however, few prosecutions under the Offenses Against the Person Act.⁹⁹

The Irish legislature affirmed its support for the Offenses Against the Person Act in 1979 with the passage of the Health (Family Planning) Act (the "Health Act").¹⁰⁰ The Health Act asserts the illegality of abortion and upholds the prohibitions established by sections 58 and 59 of the Offenses Against the Person Act.¹⁰¹ The Health Act also prohibits the sale, importation, manufacture, advertisement, or display of abortifacients in Ireland.¹⁰² Ireland's continuing restriction of abortion is an anomaly in the European Community.¹⁰³

2. The Effect of Europe's Abortion Laws on Ireland

The legalization of abortion in the United Kingdom raised fears among some in Ireland that abortion would also become legal in Ireland.¹⁰⁴ In the United Kingdom, a liberalization of

98. *Id.* § 59. Section 59 of the Offenses Against the Person Act provides that [w]hosoever 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 Mis-carriage of any Woman, whether she be or not with Child, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable . . . to imprisonment for any term not exceeding two years.

Id.

99. See Quinlan, *supra* note 93, at 374 n.15 (citing P. JACKSON, *THE DEADLY SOLUTION TO AN IRISH PROBLEM—BACKSTREET ABORTION 2* (1983) (published by Women's Right to Choose Campaign)) (noting that there have been 58 illegal abortion cases investigated or tried in Ireland between 1926 and 1974).

100. Pub. Gen. Acts, no. 20, § 10 (1979) (Ir.). Section 10 of the Health Act provides that

[n]othing in this Act shall be construed as authorising—

- (a) The procuring of abortion,
- (b) the doing of any other thing the doing of which is prohibited by Section 58 or 59 of the Offenses Against the Person Act, 1861 (which sections prohibit the administering of drugs or the use of instruments to procure abortion or the supplying of drugs or instruments to procure abortion) or
- (c) the sale, importation into the State, manufacture, advertising or display of abortifacients.

Id.

101. *Id.* § 10(c).

102. *Id.*

103. See *infra* notes 112-13 and accompanying text (discussing abortion laws in Europe).

104. See Glenn Frankel, *A Divided Ireland*, WASH. POST, Jan. 8, 1990, at A18 (stat-

abortion laws took place while the Offenses Against the Person Act was still in effect. As early as 1937, an English court held that because sections 58 and 59 prohibited not "abortion" but "unlawful abortion," there existed the possibility of lawful abortion.¹⁰⁵ Otherwise, the court argued, the word "unlawful" would have been superfluous.¹⁰⁶ This interpretation of the Offenses Against the Person Act suggested that the Act's language might not be sufficient to prevent abortion in Ireland either.¹⁰⁷

In 1967, the U.K. Parliament passed the Abortion Act.¹⁰⁸ The Abortion Act provides that a doctor may legally terminate a pregnancy within the first twelve weeks if the pregnancy could cause injury to the physical or mental health of the pregnant woman or her family.¹⁰⁹ In addition, abortion is legal until viability if there is a substantial risk of severe fetal abnormality.¹¹⁰ The United Kingdom's early move to liberalize abortion laws was soon reflected throughout continental Europe.

Developments in continental Europe also influenced political change in Ireland.¹¹¹ In the 1970s and 1980s, most Member States passed laws legalizing abortion under certain circumstances.¹¹² By 1989, when Belgium legalized abortion,

ing that anti-abortion groups "grew alarmed after Britain eased its abortion restrictions in 1967.").

105. *Rex v. Bourne*, [1939] 1 K.B. 687, 691; see *Offenses Against the Person Act*, 24 & 25 Vict., ch. 100, §§ 58-59 (Eng.). In *Bourne*, an obstetrician who performed an abortion on a 14-year-old rape victim was prosecuted under the Act and found innocent. *Id.* at 688, 696. Supporters of the current anti-abortion amendment in Ireland feared an attempt to test the existing Irish law in the courts using a sensational case. See VICKY RANDALL, *The Politics of Abortion in Ireland*, in *THE NEW POLITICS OF ABORTION* 68 (Lori Lovenduski & Joyce Outshoorn eds. 1986).

106. *Bourne*, [1939] 1 K.B. at 691.

107. See Frankel, *supra* note 104, at A18 (stating that *Offenses Against Person Act* was not strong enough in the opinion of anti-abortion groups).

108. *Abortion Act*, ch. 87 (1967) (Eng.).

109. *Id.*

110. *Id.* A severely handicapped fetus can be aborted until viability, set at 24 weeks. *Id.*

111. See William Binchy, *The Need for a Constitutional Amendment*, in *ABORTION AND LAW* 116 (A. Flannery ed., 1983) (observing that Ireland does not exist in "cultural vacuum" and trend throughout Europe is to liberalize abortion laws); see also Randall, *supra* note 105, at 70 (stating that proponents of amendment considered admission to Community to be threat to Ireland's existing prohibition of abortion).

112. See generally MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 10-62 & app. A-B (1987); *Abortion Laws in Europe*, 18 *PLANNED PARENTHOOD IN EUROPE* 1 (Supp. 1989). Most Member States express in their laws that efforts must be made

only Ireland maintained a total ban.¹¹³ Despite the differing views among the Member States of continental Europe, all give women access to legal abortion.¹¹⁴ The Community, except for Ireland, has reached the consensus that women have the right to control the size of their families to some extent through the availability of safe, legal abortion. Isolated in its ban on abortion, Ireland feared that the Community trend toward liberalization would soon be reflected in its own laws.¹¹⁵

3. Modern Abortion Law in Ireland

Social changes within Ireland also suggested that Irish laws prohibiting abortion might change unless they were more strongly articulated.¹¹⁶ For example, a 1971 Irish Supreme

to prevent unwanted pregnancies and to encourage women to carry the fetus to term. See, e.g., Law No. 75-17 (1975), J.O. Jan. 18, 1975, at 739, amended by Law No. 79-1204 (1979), J.O. Jan. 1, 1980, at 3 (Fr.) (stating its respect of every human being from commencement of life and requiring two consultations and waiting period); see also Opinion of Advocate General Van Gerven, Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan, Case C-159/90, [1991] E.C.R. —, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 558.

In the Member States with more lenient abortion laws, the woman ultimately decides if she will have an abortion in the first trimester. GLENDON, *supra*, at 21. Most of these Member States allow abortion on demand during the first ten to twelve weeks depending on varying national requirements for medical consultation, counselling, and a mandatory waiting period before obtaining an abortion. *Id.* at 14-21. Thereafter, a doctor or committee of doctors must certify the reason for the abortion. *Id.* In contrast, the Member States with stricter abortion laws give the doctor, not the woman, the power to make the final determination of whether or not an abortion is justified. *Id.* at 21. However, social ambivalence in some countries often causes practice to diverge from the law in the area of abortion. See Jodi Jacobson, *Abortion in a New Light*, *WORLD WATCH* 31, 37 (Mar.-Apr. 1990). For example, in some regions of Germany, women have difficulty finding doctors willing to perform an abortion at any stage of pregnancy, despite the law that permits abortion. *Id.*

113. See Kellaway, *Baudouin's Day Off—The Monarchy*, *FIN. TIMES*, June 18, 1990, at 31. The circumstances under which Belgium passed its abortion law demonstrate the personal and political turmoil which surrounds the issue in both Europe and the United States. In April 1990, King Baudouin of Belgium abdicated his throne for 39 hours to allow a bill legalizing abortion in the first twelve weeks of pregnancy if the woman is "in a state of distress" to be enacted without his approval. *Id.*

114. See *supra* notes 112-13 and accompanying text (discussing abortion laws in Europe).

115. See Randall, *supra* note 105, at 68 (discussing fears of Pro Life Amendment Campaign that led to amendment campaign).

116. See *id.* at 71. Abortion "must be seen as one of a number of moral issues that call into question the authority of traditional Catholic values in Ireland" which had eroded in other areas. *Id.*

Court decision, *McGee v. Attorney General*,¹¹⁷ increased the availability of contraceptives. Moreover, statistics showed an increase in the number of Irish women traveling to England for abortions, suggesting a growing acceptance of abortion as a solution to unwanted pregnancy.¹¹⁸

In 1981, a group of Irish activists formed an organization, the Pro Life Amendment Committee ("PLAC"), to stem what it considered a trend toward legalization of abortion in Ireland.¹¹⁹ PLAC considered a constitutional amendment the

117. 1974 I.R. 284 (Ir. S.C.). Trends in the United States have also influenced Irish opinions. See Binchy, *supra* note 111, at 121. U.S. constitutional law has had considerable influence on Irish judges. *Id.*; see *O'Brien v. Stoutt*, 1984 I.R. 316, 325 (Ir. H. Ct.), *aff'd*, 1984 I.R. 326 (Ir. S.C.) (stating that "[d]ecisions of the Supreme Court of the United States will always be received in this Court with the greatest of respect.").

In the United States, the reform of abortion laws was based on the constitutional right to privacy under the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. 113 (1973). The liberalizing trend began, as it would in Ireland, with the recognition of the right to privacy for married couples regarding contraception. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that law prohibiting use of contraceptives by married persons violates "right of marital privacy"). In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court extended the availability of contraception to unmarried people. *Eisenstadt* and *Griswold* laid the groundwork for the U.S. Supreme Court's landmark decision, *Roe v. Wade*, 410 U.S. 113 (1973). *Roe v. Wade* recognized the right of women to choose to have an abortion during the first trimester but left the regulation of later abortion to the states. *Id.* at 163. This deference to the U.S. Supreme Court was expressed in *McGee*, the Irish Supreme Court case making contraception available in Ireland, which cited both *Eisenstadt* and *Griswold*. *McGee*, 1974 I.R. at 319. Moreover, the U.S. Supreme Court decision in *Roe v. Wade* "was one of the elements in the move to amend the Irish Constitution to protect 'unborn life.'" Walsh, *supra* note 85, at 817.

118. See J.R. Ashton, *The Impact of the Hamilton Ruling [Open Door Counselling] on the Health of Irish Women* 6 (May 1990) (on file with *Fordham International Law Journal*); see also *Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd. v. Ireland*, Joined Cases 14234-35/88, slip op. at 9 (Eur. Comm'n H.R. Mar. 7, 1991) (estimating that over 3,500 women travel each year to England for abortion). Actual figures are much higher because many Irish women give false English addresses. See Ashton, *supra*.

On the other hand, there is often a dichotomy between the consciousness of women and the tenets of the dominant religion. See UNITED NATIONS, DEP'T OF INT'L ECONOMIC AND SOCIAL AFFAIRS, POPULATION AND HUMAN RIGHTS; PROCEEDINGS OF THE EXPERT GROUP MEETING ON POPULATION AND HUMAN RIGHTS, 3-6 APRIL 1989, U.N. Doc. ST/ESA/SER.R/177, at 120 (1990). The dominant religion of a nation has a considerable impact on public decisions of that nation, but does not affect the consciousness of women to the same degree. *Id.* The result of this inconsistency significantly increases the incidence of illegal abortion in countries where the dominant religion is opposed to abortion. *Id.* In the case of Ireland, however, the result is more often flight to countries that permit abortion. See Ashton, *supra*.

119. The Pro Life Amendment Campaign (PLAC) was founded on April 28,

best way to prevent the legalization of abortion in Ireland.¹²⁰ PLAC mounted a two-year campaign during an unusual political period which witnessed three general elections.¹²¹ Hesitant to offend the 95 percent Catholic constituency during a close race,¹²² all three major political parties announced support for a constitutional amendment within three weeks of PLAC's formation.¹²³ In September 1983, following a national referendum,¹²⁴ the legislature ratified the Eighth Amendment.¹²⁵

The Eighth Amendment to the Irish Constitution provides that "[t]he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate that right."¹²⁶ The amendment does not acknowledge the absolute right to life of the fetus. Rather, that right is limited by the equal right of the mother, and by other unspecified situations where protecting the fetus would not be "practicable."¹²⁷ Despite the somewhat ambigu-

1981. See Kevin Boyle, *An Insult to the Constitution*, in *THE ABORTION REFERENDUM, THE CASE AGAINST 28* (Arnold & Kirby eds. 1982). PLAC was an umbrella organization for thirteen organizations, several of which were associated with the Catholic Church. See Randall, *supra* note 105, at 71. On the eve of the national referendum, SPUC, a radical organization which sought to promote grass roots support, was invited to join PLAC. *Id.* at 70. PLAC asserted that a constitutional amendment would both prevent the legislature from legalizing abortion and stop the judiciary from interpreting liberally the Offenses Against the Person Act. See Quinlan, *supra* note 93, at 371; see also Randall, *supra* note 105, at 68 (stating that "[t]he principal declared objective of the pro-amendment campaigners was to prevent the legalization of abortion inside Ireland").

120. See Binchy, *supra* note 111, at 117 (noting concern that legal protection of fetus was inadequate without amendment).

121. See Randall, *supra* note 105, at 73.

122. See *id.* at 72 (noting that given narrow electoral margin and overwhelmingly Catholic electorate, few politicians would condone legal abortion).

123. See Boyle, *supra* note 119, at 29 (stating that by May 15, 1981 political parties Fine Gael and Fianna Fail had committed themselves to amendment and Labour had given general assent).

124. See Mary Ann Glendon, *Irish Family Law in Comparative Perspective*, 9 *DUBLIN U. L.J.* 1 (1987). Under the Irish Constitution, an amendment must be submitted to the Dil as a bill. IR. CONST. art. 46. The bill must pass both legislative houses and be submitted to the people for a referendum. *Id.* Voter turnout, usually 70 percent or more, was low at 54 percent. See Quinlan, *supra* note 93, at 390.

125. IR. CONST. art. 40.3.3; see CASEY, *supra* note 88, at 28 (discussing passage of amendment).

126. IR. CONST. art. 40.3.3.

127. *Id.*

ous wording of the amendment, the legislature has not passed any law pursuant to it and its interpretation has been left to the courts.¹²⁸

*Attorney General ex rel. Society for the Protection of Unborn Children v. Open Door Counselling*¹²⁹ first tested the Supreme Court's interpretation of the scope of the Eighth Amendment with regard to the provision of information about abortion.¹³⁰ In *Open Door Counselling*, the defendant clinics provided to pregnant women services that included counselling on the alternatives and assistance available to them.¹³¹ One of the options discussed in the cases of unwanted pregnancy was the possibility of abortion.¹³² If a woman wished to consider the abortion alternative further, the clinics would generally refer her to a qualified facility in England.¹³³ The Irish clinics examined in advance the facilities to which they referred women to ensure that their clients would receive responsible advice and quality care.¹³⁴ The Society for the Protection of Unborn Children ("SPUC") sought an injunction to halt the counselling.¹³⁵ SPUC asserted that the clinics' activities were a "conspiracy to corrupt public morals" and unlawful under the Eighth Amendment.¹³⁶ The clinics, on the other hand, asserted that they had a right to expression guaranteed by the Human Rights Convention.¹³⁷

The Supreme Court of Ireland held in *Open Door Counselling* that the right to freedom of expression must yield to the fetus' "right to life."¹³⁸ According to the Court, the Eighth

128. See *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, 1989 I.R. 760, 770 (Ir. S.C.); see, CASEY, *supra* note 88, at 313-14.

129. 1988 I.R. 618 (Ir. S.C.).

130. *Id.*

131. *Attorney General ex rel. Society for the Protection of Unborn Children (Ireland) Ltd. v. Open Door Counselling Ltd.*, 1988 I.R. 593, 600-601 (Ir. H. Ct.), *aff'd in part, rev'd in part*, 1988 I.R. 618 (Ir. S.C.).

132. *Id.* at 601.

133. *Id.* at 600.

134. *Id.* at 601.

135. *Id.* at 600.

136. *Id.*; see James Friedman, *On the Dangers of Moral Certainty and Sacred Trusts*, 10 DUBLIN U. L.J. 71, 72 (1988).

137. *Attorney General ex rel. Society for the Protection of Unborn Children (Ireland) Ltd. v. Open Door Counselling Ltd.*, 1988 I.R. 593, 605 (Ir. H. Ct.), *aff'd in part, rev'd in part*, 1988 I.R. 618 (Ir. S.C.); see also Human Rights Convention, *supra* note 6, art. 10(1).

138. *Open Door Counselling*, 1988 I.R. at 617.

Amendment not only forbids the medical termination of pregnancy, but also bars spoken and written information regarding the specifics of its availability outside of Ireland.¹³⁹ Although the case was still on appeal with the European Court on Human Rights,¹⁴⁰ SPUC aimed the new Irish Supreme Court holding at others who were disseminating information about legal abortion.¹⁴¹

II. *SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN (IRELAND) LTD. v. GROGAN*

In a move designed to ban in Ireland any information regarding the availability of abortion services in other Member States, SPUC sued the members of several student organizations.¹⁴² The students published and distributed handbooks, free of charge, that contained information regarding alternatives available to pregnant women which included keeping the child, adoption, foster care and methods for communicating with facilities in England that provide abortion services.¹⁴³ SPUC sought to enjoin the students' distribution of the information, arguing that it assisted women to terminate pregnancy in violation of the Eighth Amendment.¹⁴⁴

139. *Id.*

140. *Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd. v. Ireland*, Joined Cases 14234-35/88, slip op. (Eur. Comm'n H.R. Mar. 7, 1991). The case was appealed to the European Court of Human Rights to resolve the conflict of rights. *Id.* On March 7, 1991, the European Commission of Human Rights determined that Ireland had violated Article 10(1) of the Human Rights Convention. *Id.* slip op. at 13; see *supra* note 6 for text of Article 10 of the Human Rights Convention.

141. See, e.g., *Society for the Protection of Unborn Children v. Coogan*, 1989 I.R. 738 (Ir. S.C.) (finding that SPUC's bona fide interest in abortion justified standing); see also *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. —, —, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 581; Frankel, *supra* note 104, at A18. SPUC's president, Mary Lucey, said that "[w]e don't want to stop anyone's right to travel, even if to go get an abortion . . . [b]ut a woman has no right to information that will help her kill her unborn child." *Id.*

142. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, 1989 I.R. 760, 761 (Ir. S.C.). A question arose regarding SPUC's standing to bring this case on its own behalf, rather than to bring it with the Irish Attorney General as it had in *Open Door Counselling*, 1988 I.R. 618. See CASEY, *supra* note 88, at 313 n.10a. The Supreme Court, however, took the appeal based on its recent holding in *Coogan*, 1989 I.R. 738. *Grogan*, [1989] I.R. at 761. The defendants were elected officers of three groups: the Union of Students in Ireland, the Students' Union of University College Dublin, and the Students' Union of Trinity College Dublin. *Id.*

143. *Grogan*, 1989 I.R. at 766-67.

144. *Id.* at 761.

The students, on the other hand, argued that Irish nationals had a right under Articles 59 and 60 of the Treaty to travel to another Member State to receive medical services lawfully provided there.¹⁴⁵ As a corollary to that right, the students asserted, Irish nationals had a right to know about the existence of medical services available in other Member States.¹⁴⁶ The students concluded that the right to receive information regarding services available in other Member States must be supported by a corresponding right to impart such information.¹⁴⁷ Such an interpretation, moreover, would be consistent with the Human Rights Convention.¹⁴⁸

A. *Proceedings at the National Level*

The Irish High Court¹⁴⁹ found that it was unable to decide *Grogan* until the Court of Justice resolved the questions of Community law presented by the students.¹⁵⁰ The High Court defined the issue presented in the case as whether the right to receive information gives rise to a corresponding right to impart information.¹⁵¹ The High Court distinguished *Open Door Counselling* on the ground that the students in *Grogan* had merely published information without assisting in the procurement of an abortion.¹⁵²

To resolve the questions of Community law, the High Court referred questions to the Court of Justice for a preliminary ruling pursuant to Article 177 of the Treaty¹⁵³ and refused to issue an interlocutory injunction to prevent the publi-

145. *Id.*

146. *Id.*

147. *Id.*

148. See *supra* note 6 (quoting Article 10 of Human Rights Convention).

149. See CASEY, *supra* note 88, at 223 (noting that Irish High Court is court of first instance); see also IR. CONST. art. 34.1.

150. Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan 1989 I.R. 753, 758 (Ir. H. Ct.), *aff'd in part, rev'd in part*, 1989 I.R. 760 (Ir. S.C.).

151. *Id.* at 758. The High Court stated that "if there is a right to receive information, there must be a corresponding right to give it, and that is the issue which arises in this case." *Id.*

152. *Id.*

153. *Id.* Article 177 of the Treaty provides that "any national court or tribunal" may refer prejudgment questions to the Court of Justice in order to clarify Community law if the national court considers that a decision on the question is necessary to enable it to give judgement. EEC Treaty, *supra* note 1, art. 177. Upon receiving an answer, the national court must then apply Community law as articulated by the Court of Justice to the facts in the case before it. Article 177 provides in part that

cation of the handbooks.¹⁵⁴ The first question referred to the Court of Justice addressed the definition of the term "services" under Article 60 of the Treaty.¹⁵⁵ The second and third questions addressed the existence of specific rights of the students under Community law to distribute information regarding abortion.¹⁵⁶

SPUC appealed to the Supreme Court, seeking an interlocutory injunction pending the decision of the Court of Justice.¹⁵⁷ It also requested a declaration that the students' publication, insofar as it specified clinics in England, violated the Eighth Amendment.¹⁵⁸ The Supreme Court took the appeal, despite the students' argument that the High Court had not

[t]he Court of Justice shall have jurisdiction to give preliminary rulings concerning:

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

EEC Treaty, *supra* note 1, art. 177.

154. *Grogan*, 1989 I.R. at 758.

155. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. __, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 577. The first question read: "Does the organised activity or process of carrying out an abortion or the medical termination of pregnancy come within the definition of "services" provided for in art. 60 of the [EEC Treaty]?" *Id.* at __, Common Mkt. Rep. (CCH) [1991] 2 CEC at 542.

156. *Id.* The second and third questions read:

2. In the absence of any measures providing for the approximation of the laws of member states concerning the organised activity or process of carrying out an abortion or the medical termination of pregnancy, can a member state prohibit the distribution of specific information about the identity, location and means of communication with a specified clinic or clinics in another member state where abortions are performed?

3. Is there a right at Community law in a person in member state A to distribute specific information about the identity, location and means of communication with a specified clinic or clinics in member state B where abortions are performed, where the provision of abortion is prohibited under both the constitution and the criminal law of member state A but is lawful under certain conditions in member state B?

Id. at __, Common Mkt. Rep. (CCH) [1991] 2 CEC at 542-43.

157. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, 1989 I.R. 760, 760-61 (Ir. S.C.).

158. *Id.* at 761. The defendants requested that a declaration that any publication published or distributed under the aegis of the defendants which contains information calculated to inform persons (including pregnant women) of the identity and location of and method of communication with a specified clinic or clinics where abortions are per-

made an appealable decision.¹⁵⁹ The Supreme Court found that the High Court had made two “decisions”: one to refer questions to the Court of Justice, and another not to issue the injunction.¹⁶⁰ The Supreme Court left the referral unaltered,¹⁶¹ but asserted that the failure to issue an interlocutory injunction was an appealable decision.¹⁶²

In examining the merits of the case, the Supreme Court refused to distinguish *Grogan* from *Open Door Counselling*.¹⁶³ Therefore, according to the Supreme Court, the High Court’s failure to issue an interlocutory injunction changed the status quo established in *Open Door Counselling*.¹⁶⁴ The High Court erred, according to the Supreme Court, by neglecting to apply the clearly established rule prohibiting the dissemination of in-

formed is contrary to the provisions of the Constitution of Ireland and in particular Article 40.3.3 [the Eighth Amendment] thereof.

Id.

159. *Id.* at 762.

160. *Id.*

161. *Id.* at 763. The Court admonished the attempt by the Irish High Court to postpone action until the Court of Justice had rendered its preliminary ruling. *Id.* at 767-68. In accepting the appeal, the Irish Supreme Court stated that the High Court does not have “free and untrammelled power” to forestall a decision that can be made based on national law. *Id.* at 768.

162. *Id.* at 762-63. The students argued that the Supreme Court had no jurisdiction because the High Court had not yet handed down a “decision,” only an Article 177 referral. *Id.* at 762. On the basis of the Irish Supreme Court decision in *Campus Oil Ltd. v. Minister for Industry and Commerce*, 1983 I.R. 82 (Ir. S.C.), they argued that an Article 177 referral was not appealable. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, 1989 I.R. 760, 760-61 (Ir. S.C.). The Supreme Court accepted jurisdiction in *Grogan*, however, noting that “no mere absence of formal words from a High Court order could be permitted to remove from the appellate jurisdiction of [the Supreme Court] a determination of a High Court judge which affects one of the parties involved and has all the characteristics of a decision.” *Id.* at 763.

163. *Grogan*, 1989 I.R. at 764.

164. *Id.* The Supreme Court stated that

[t]his application for an interlocutory injunction, therefore, consists of an application to restrain an activity which has been clearly declared by this Court to be unconstitutional [in *Attorney General ex rel Society for the Protection of Unborn Children (Ireland) Ltd. v. Open Door Counselling Ltd.*, 1988 I.R. 618] and therefore unlawful and which could assist and is intended to assist in the destruction of the right to life of an unborn child, a right acknowledged and protected under the Constitution.

Grogan, 1989 I.R. at 764-65. The Court dismissed the students’ argument that the information contained in the booklets had already been distributed in various ways prior to the suit, making distribution the status quo ante to be maintained. *Id.* at 762.

formation regarding legal abortion.¹⁶⁵

In balancing the rights of the fetus against competing rights, the Supreme Court asserted that no Community law regarding services could outweigh the rights guaranteed the fetus by Ireland's Constitution.¹⁶⁶ The Court noted 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."¹⁶⁷ This view suggested that even if the Court of Justice were to find that Ireland's law conflicted with a "fundamental pillar"¹⁶⁸ of Community law, the Supreme Court would subject the Treaty to Ireland's constitutional provisions.¹⁶⁹ The Irish Supreme Court's statement is completely contrary to the jurisprudence of the Court of Justice regarding the supremacy of Community law.¹⁷⁰

165. *Grogan*, 1989 I.R. at 762.

166. *Id.* at 765.

167. *Id.*

168. EEC Treaty, *supra* note 1, art. 3.

169. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, 1989 I.R. 760, 768 (Ir. S.C.). In his opinion, Justice Walsh added that

[i]t has been sought to be argued in the present case that the effect of the amendment of Article 29 of the Constitution, which was necessary to permit our adhesion to the treaties of the European Communities, is to qualify all rights including fundamental rights guaranteed by the Constitution. The Eighth Amendment of the Constitution is subsequent in time, by several years, to the amendment of Article 29. That fact may give rise to the consideration of the question of whether or not the Eighth Amendment itself qualifies the amendment to Article 29. . . . [A]ny 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.

Id. at 768-69.

170. See *supra* note 2 and accompanying (discussing supremacy of Community law); see also, *IHG*, Case 11/70, [1970] E.C.R. 1125, 1134, [1972] C.M.L.R. 255, 283. In *IHG*, the Court stated that

the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

Id.

But see *Battle of Maastricht*, THE ECONOMIST, Feb. 29, 1992, at 55. Ireland inserted a special protocol in the proposed Maastricht Treaty on European Union, due to be voted on by referendum in Ireland this year. *Id.* It reads:

Nothing in the Treaty on European Union or in the treaties establishing the

Moreover, the Supreme Court questioned whether abortion could even be considered a "service" given that it is "manifestly contrary" to the public morality as well as "destructive of the most fundamental of all human rights."¹⁷¹ The Supreme Court asserted that just because "grossly immoral" activities may be permitted in other Member States, those activities do not necessarily fall within the sphere of Community law.¹⁷² The Supreme Court concluded that a Member State should not be obliged to permit activities designed to undermine guarantees for the protection of a fundamental human right.¹⁷³

Despite its discussion of the fundamental rights of the fetus, the Supreme Court failed to address the substance of the

European Communities or in the treaties or acts modifying or supplementing those treaties shall affect the application in Ireland of [the Eighth Amendment] of the constitution of Ireland.

Id.

Because the protocol specifies the application of the law "in Ireland," commentators suggest that the protocol is intended to ensure that Community law could not be invoked in the future to allow abortion in Ireland. *Id.* Regarding the meaning of the protocol, former Taoiseach Charles Haughey allegedly assured Community heads of state that the Irish Constitution did not prevent women from traveling to other Member States for medical services legal in those countries. Sam Smythe, *Girl's Family Seeks Haughey EC Letter*, IR. INDEPENDENT (Sunday ed.), Feb. 23, 1992, at 1.

Moreover, the Maastricht protocol may be contrary to Article 29.3.4 of the Irish Constitution which provides, in relevant part, that

[n]o provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.

IR. CONST., art. 29.3.4.

171. *Id.* at 769. The Court dismissed the students' contention that the validity of an interim relief to protect threatened directly effective Community rights was a matter properly decided by the Court of Justice under the principles enunciated in *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, Case C-213/89, [1990] E.C.R. 2433, [1990] 3 C.M.L.R. 1. The Court maintained that the two cases were distinguishable in that *Factortame* related to an injunction restraining an act of Parliament, a form of relief which was prohibited by national law, while *Grogan* concerned an injunction which was "not only consistent with but is in full accord with [Ireland's Constitution]." *Grogan*, 1989 I.R. at 765. In granting the injunction, the Court noted that "both the question as to the stage of the action in the member state at which that reference is made and what steps . . . the courts of the member state may take . . . are peculiarly matters for the national courts to be considered and decided in accordance with national law." *Id.* at 765-66.

172. *Grogan*, 1989 I.R. at 769.

173. *Id.*

students' fundamental rights argument. Both Ireland and the Community recognize that humans who are already born have certain fundamental rights.¹⁷⁴ The students asserted that in addition to the rights granted by the Treaty, they had a right to impart information under Article 10(1) of the Human Rights Convention.¹⁷⁵ The Supreme Court merely concluded that a "procedural" Community law regarding the free movement of services could not override the "fundamental" right to life of the fetus.¹⁷⁶

The Supreme Court issued an interlocutory injunction and allowed the Article 177 referral.¹⁷⁷ This injunction banned the publication and distribution of information regarding the availability of abortion pending the Court of Justice's ruling.¹⁷⁸ The Supreme Court provided for a final resolution of the case by the High Court following the answers determined by the Court of Justice.¹⁷⁹

B. *Proceedings in the European Court of Justice*

In addressing the first question regarding the qualification of abortion as a service,¹⁸⁰ the Court of Justice considered both

174. See Justice Brian Walsh, *Foreword to CASEY*, *supra* note 88, at viii (regarding natural rights protected by Irish Constitution); see also *supra* notes 84-91 and accompanying text (discussing fundamental rights in Community law).

175. Human Rights Convention, *supra* note 6, art. 10(1). The Human Rights Convention applies to the Community under the Treaty by virtue of the S.E.A.. S.E.A., *supra* note 2, pmb., O.J. L 169/1 (1987). The European Court of Human Rights does not recognize fetal rights. Opinion of Advocate General Van Gerven, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. ___, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 570-71; see Quinlan, *supra* note 93, at 399-401 (discussing briefly all abortion cases which have come before Court of Human Rights).

176. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, 1989 I.R. 760, 766 (Ir. S.C.).

177. *Id.* at 761.

178. *Grogan*, [1991] E.C.R. ___, Common Mkt. Rep. (CCH) [1991] 2 CEC at 577.

179. *Grogan*, 1989 I.R. at 766.

180. See *supra* note 155 (presenting first question). The Court of Justice accepted jurisdiction of the case despite SPUC's argument that it did not fall within the scope of the Treaty. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. at ___, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 578. First, SPUC argued, the students did not distribute the information in the context of any economic activity, precluding application of the Treaty provisions regarding services. *Id.* Second, since the information was distributed within Ireland, the case lacked the cross-border element requisite for application of the Treaty. *Id.* The Court found that SPUC's arguments went to the heart of the questions referred

Article 60 and the case law interpreting it. Abortion qualifies as a service under Article 60, the Court noted, because it is normally provided for remuneration, and is not covered by Treaty provisions relating to the free movement of goods, capital or persons.¹⁸¹ Moreover, similar to its holding in *Luisi and Carbone*, the Court of Justice in *Grogan* held that abortion satisfies the requirements of Article 60(d), which includes the activities of the professions, because it is a medical procedure performed by doctors.¹⁸² The Court of Justice therefore dismissed SPUC's argument that a "grossly immoral" activity could not qualify as a service, asserting that the characterization of an activity as immoral by one Member State cannot be imposed on another Member State that permits the activity.¹⁸³ The Court concluded that abortion constitutes a service within the meaning of the Treaty.¹⁸⁴

Finding that abortion is a service, the Court of Justice then considered the second and third questions, seeking to determine whether prohibiting the students from distributing information regarding abortion conflicted with Community law.¹⁸⁵ The Court asserted that the link between the activity of the students' associations and the clinics in England was too tenuous for a prohibition on the distribution of information to be regarded an obstruction to the free flow of services under the Treaty.¹⁸⁶

Although the Court had never before required such a link, it did not discuss the new requirement. The Court of Justice in

by the High Court. *Id.* Therefore, while they could be considered in answering the questions, they were not determinative of jurisdiction. *Id.*

181. *Grogan*, [1991] E.C.R. at __, Common Mkt. Rep. (CCH) [1991] 2 CEC at 579.

182. *Id.*

183. *Id.* The Court of Justice noted that "[w]hatever the merits of those arguments on a moral plane . . . [i]t is not for the court [of Justice] to substitute its assessment for that of the legislature in those member states where the activities in question are practised legally." *Id.*

184. *Id.* at __, Common Mkt. Rep. (CCH) [1991] 2 CEC at 580.

185. *Id.*

186. *Id.* at __, Common Mkt. Rep. (CCH) [1991] 2 CEC at 579. Regarding Article 59, the Court concluded, without discussion, that "the link between the activity of the students' associations . . . and medical terminations of pregnancies carried out in clinics in another member state is too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of art. 59 of the Treaty." *Id.*

Grogan merely concluded that because the students did not act on behalf of an economic operator, they could not appeal to the Treaty for protection of their rights under Article 59.¹⁸⁷ The Court distinguished *GB-INNO*,¹⁸⁸ the case cited in Advocate General Van Gerven's opinion,¹⁸⁹ in which the Court held that a prohibition on advertising obstructed the free movement of goods in violation of the Treaty.¹⁹⁰ In *Grogan*, the Court noted that a link had existed between the advertiser and the provider of goods in *GB-INNO* that did not exist in *Grogan*.¹⁹¹ The *Grogan* Court's use of the word "link" with reference to *GB-INNO* is misleading because in *GB-INNO* the Court noted the importance of the link between protecting the consumer and providing the consumer with information.¹⁹² The *GB-INNO* Court did not mention the necessity of a link between the seller and the advertiser, but between the consumer and the advertisement.¹⁹³ The *Grogan* Court thus quoted *GB-INNO* out of context, and never mentioned the importance of information to the consumer which was stressed in the case.

The implications of the Court of Justice's conclusion that the students did not qualify for Treaty protection were twofold. First, the Court of Justice did not need to apply Article 62, the standstill clause that prevents the imposition of any new restrictions on services after the entry into force of the Treaty. The Court noted that Article 62 works only in conjunction with Article 59, and cannot prohibit restrictions which do not fall within the scope of Article 59.¹⁹⁴ Thus, the Court did not have occasion to consider whether the ban on information was a "new restriction" even though both the passage of

187. *Id.*

188. *GB-INNO-BM*, Case C-362/88, [1990] E.C.R. 667, [1991] 2 C.M.L.R. 801.

189. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. —, —, *Common Mkt. Rep. (CCH)* [1991] CEC 539, 558.

190. *GB-INNO*, [1990] E.C.R. at 689, [1991] 2 C.M.L.R. at 816.

191. *Grogan*, [1991] E.C.R. at —, *Common Mkt. Rep. (CCH)* [1991] 2 CEC at 578.

192. *GB-INNO*, [1990] E.C.R. at 688, [1991] 2 C.M.L.R. at 815. The Court stated that "[i]t should be observed first of all that Community policy on the subject establishes a close link between protecting the consumer and providing the consumer with information." *Id.*

193. *Id.*

194. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, [1991] E.C.R. —, —, *Common Mkt. Rep. (CCH)* [1991] 2 CEC 539, 580.

the amendment and the Supreme Court's interpretation of it occurred after the Treaty came into effect.¹⁹⁵

Second, finding the students' activities to be outside the scope of the Treaty relieved the Court of jurisdiction to decide the students' argument regarding the breach of their right to freedom of expression under Article 10(1) of the Human Rights Convention.¹⁹⁶ Since the its decision in *Internationale Handelsgesellschaft mbH v. Einfuhr-und-Vorratsstelle*,¹⁹⁷ the Court of Justice has used the Human Rights Convention to help determine the general principles of fundamental rights in Community law.¹⁹⁸ In answering questions of Community law, therefore, the Court is bound to consider the rights granted by the Human Rights Convention.¹⁹⁹ Where a case does not implicate Community law, however, the Court of Justice will not address the fundamental rights question.²⁰⁰

III. A BAN ON INFORMATION OBSTRUCTS THE CREATION OF THE INTERNAL MARKET

The Court of Justice's judgment in *Grogan* hinders the development of the internal market in two distinct ways. First, the Court's failure to address the issue of access to information as corollary to the right to receive services weakens one of the fundamental pillars of the Community. As the Court held in *GB-INNO*, an absence of information impedes access to serv-

195. Compare IR. CONST., art. 29.3.4 (noting accession of Ireland to EC) with *supra* note 125 (noting passing of Eighth Amendment in 1983).

196. *Grogan*, [1991] E.C.R. at —, Common Mkt. Rep. (CCH) [1991] 2 CEC at 580 (citing *Elliniki Radiophonia Tiléorassi—Anonimi Etairia (ERT-AE) v. Pliroforisis Dimotiki Etairia (DEP)*, Case C-260/89 (Eur. Ct. J. June 18, 1991) (not yet reported) [hereinafter ERT]). In *ERT*, the Court held that it must provide the national court with all the elements of interpretation necessary to enable the national court to determine the compatibility of national legislation with fundamental human rights as provided in the European Convention on Human Rights. *ERT*, slip op. ¶ 42. However, the *Grogan* Court noted, a decision regarding the compatibility of national legislation with fundamental rights is not necessary when, as here, the legislation is not within the scope of the Treaty. *Grogan*, [1991] E.C.R. at —, Common Mkt. Rep. (CCH) [1991] 2 CEC at 580.

197. *IHG*, Case 11/70, [1970] E.C.R. 1125, 1134, [1972] C.M.L.R. 255, 283.

198. See *supra* notes 84-91 and accompanying text (discussing fundamental rights in Community law).

199. See *supra* note 86 and accompanying text (noting Court's obligation to address fundamental rights issues).

200. See *supra* note 91 (discussing limit to Court's jurisdiction in area of fundamental rights).

ices offered in other Member States to the detriment of intra-Community trade.²⁰¹ Although not overruling *GB-INNO*, the Court's failure to address the issue in *Grogan* nevertheless allowed a ban on information for services to remain in effect. Second, the failure of the Court of Justice to resolve the conflict of rights in *Grogan* undermines the law of fundamental rights that the Court developed to ensure a unified Community. Moreover, the Court left unchallenged the Irish Supreme Court's suggestion that a subsequent domestic law can modify Community law.²⁰² Declining to confront the Irish Court's misguided statement may ultimately lead to further controversy.

A. *A Ban on Information is Contrary to Specific Treaty Provisions*

The freedom to provide services guaranteed by the Treaty includes the right to travel to another Member State to receive services there without obstruction.²⁰³ This right is not, as the Irish Supreme Court suggested, merely procedural.²⁰⁴ The free exchange of services is essential to the functioning of the internal market.²⁰⁵ Trade in services is increasingly important for a modern economy.²⁰⁶ By creating a dichotomy that slights the area of services, the Court created a problem more far-reaching than the one it sought to solve.

1. Access to Abortion Services Is Protected by the Treaty

The Court of Justice recognized abortion as a service within the meaning of Article 60 because it is normally pro-

201. See *GB-INNO-BM*, Case C-362/88, [1990] E.C.R. 667, 689, [1991] 2 C.M.L.R. 801, 816; see also Opinion of Advocate General Van Gerven, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. —, —, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 556.

202. See *infra* note 264 (discussing supremacy of Community law).

203. See *supra* notes 24-47 and accompanying text (discussing freedom to receive services).

204. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, 1989 I.R. 760, 766 (Ir. S.C.).

205. See *Italy v. Watson*, Case 118/75, [1976] E.C.R. 1185, [1976] 2 C.M.L.R. 552. In *Watson*, an *au père* entered Italy ostensibly as a tourist. Although the facts did not support her claim that she was entitled to Treaty protection as a recipient of services, the Court of Justice recognized in dicta that the rules on the free movement of both recipients and providers of services represent a fundamental principle that must take precedence over national law. *Id.* at 1198, [1976] 2 C.M.L.R. at 572.

206. See Steindorff, *supra* note 23, at 353.

vided for remuneration and involves the activities of the professions.²⁰⁷ The Court supported this conclusion by citing its previous decision, *Luisi and Carbone*, in which medical services were explicitly held to fall within the scope of Article 60.²⁰⁸

Having met the threshold requirements of Article 60, the free access to abortion services is guaranteed by Article 59. Unless it can justify derogation from the Treaty, no Member State may obstruct the flow of services either directly, by restricting the providers of the service, or indirectly by restricting the recipients.²⁰⁹ Therefore, a woman traveling to England for the purpose of receiving medical services to terminate a pregnancy qualifies for Treaty protection as the recipient of a service.²¹⁰ Absent a justified derogation from the provisions of the Treaty, Ireland cannot restrict her movements.²¹¹

2. Access to Information Should Be Corollary to the Right to Receive Abortion Services

The Court of Justice recognizes that corollary rights are necessary to protect the recipients of services.²¹² In *Luisi and Carbone*, for example, the Court recognized the right to transfer capital as a corollary to the right to receive services.²¹³ In that case, the Court of Justice found that preventing an individual

207. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. —, —, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 579; see *supra* notes 11-23 and accompanying text (regarding Treaty provisions for free movement of services).

208. *Luisi and Carbone v. Ministero del Tesoro*, Joined Cases 286/82 & 26/83, [1984] E.C.R. 377, [1985] 3 C.M.L.R. 52; see *supra* notes 32-47 and accompanying text (discussing corollary right that attaches to freedom to receive services). Moreover, the Court agreed with the students' argument that the cross-border element present in the case implicated Community law. *Grogan*, [1991] E.C.R. at —, Common Mkt. Rep. (CCH) [1991] 2 CEC at 577.

209. Service Directive, *supra* note 3, O.J. Eng. Spec. Ed. 1963-1964, at 116 (1964).

210. *Grogan*, [1991] E.C.R. at —, Common Mkt. Rep. (CCH) [1991] 2 CEC at 579.

211. See *id.*; see also Parliamentary Resolution, O.J. C 106/113 (1991). The European Parliament's resolution concerned the actions of the German border police who forced women suspected of having had abortions in the Netherlands to undergo gynecological exams. Parliament condemned the practice, concluding that the "Community's internal borders should not be used to threaten citizens with prosecution for activities that are legal in some Member States but not in others." *Id.*

212. See *supra* notes 32-47 (discussing corollary rights).

213. See *supra* notes 32-38 (discussing *Luisi and Carbone v. Ministero del Tesoro*, Joined Cases 286/82 & 26/83, [1984] E.C.R. 377, [1985] 3 C.M.L.R. 52).

from paying for a service is tantamount to preventing that individual from receiving that service.²¹⁴ *Luisi and Carbone* set the precedent for the recognition of corollary rights as necessary to guarantee the free flow of services.²¹⁵

Moreover, the Court of Justice recently recognized access to information as an indispensable corollary to the free movement of goods, an area closely analogous to services.²¹⁶ The Court asserted in *GB-INNO* that the provision of information to the consumer is a "principal requirement" under Community law.²¹⁷ National legislation that denies the consumer access to information, such as the prohibition on the advertisement of discount prices in Belgium to consumers in Luxembourg, cannot be justified under the Treaty.²¹⁸

The same principle of access to information should apply equally to consumers of services as to consumers of goods.²¹⁹ If the absence of information regarding goods impedes the right of the Luxembourg consumer to purchase goods in Belgium, an absence of information regarding services obstructs the right of the Irish consumer to receive services in England. To prevent such an obstruction, the Court in *Grogan* should have recognized that the right to receive information regarding the availability of services must be corollary to the right to receive services.

As Advocate General Van Gerven noted in *Grogan*, this analysis remains valid where the information comes from a person other than the provider who does not act on the provider's behalf.²²⁰ In *GB-INNO*, the Court concluded that ac-

214. *Luisi and Carbone*, [1984] E.C.R. at 406, [1985] 3 C.M.L.R. at 81.

215. *See id.*; *see also* *Cowan v. Le Trésor Public*, Case 186/87, [1989] E.C.R. 195, [1990] 2 C.M.L.R. 613 (finding that protection from harm in Member State to which recipient travels for services is corollary right).

216. *See supra* notes 39-47 (discussing *GB-INNO*, Case C-362/88, [1990] E.C.R. 667, [1991] 2 C.M.L.R. 801).

217. *GB-INNO*, [1990] E.C.R. at 689, [1991] 2 C.M.L.R. at 816.

218. *Id.* at 690, [1991] 2 C.M.L.R. at 817.

219. Opinion of Advocate General Van Gerven, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. —, —, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 561; *see* Comm'n White Paper, *supra* note 1, at 18 (stating that "distinction between goods and services has never been a valid one, and the Community has weakened its own economic potential by maintaining it.").

220. *Grogan*, [1991] E.C.R. at —, Common Mkt. Rep. (CCH) [1991] 2 CEC at 560.

cess to information was essential to the free movement of goods based not on the rights of the provider or advertiser, but on the right of the consumer to receive information.²²¹ The right to impart information must be inherent in the primary right to receive it. To be effective, the right to receive services must be supported by the freedom to receive information. This right exists regardless of consideration paid by the clinics to the students.²²²

Although the Irish Supreme Court asserted that the same information entered Ireland through other sources, the absence of the information distributed by the students may impede some women from availing themselves of the service.²²³ Already, the dearth of information caused by the injunction has forced women who want abortion services to go to England at a later stage of pregnancy.²²⁴ Although abortion at an early stage of pregnancy is a safe procedure, abortion at later stages threatens the woman's life and future ability to bear children.²²⁵ Certainly, the ban hinders the ability of women to choose a reputable clinic, and to compare cost and convenience. The ban on information which obstructs access to safe, legal abortion not only hinders the development of service law, but also may have grave effects on the health of Irish women.²²⁶ Moreover, even if it is true that some Irish women have access to this information through newspapers and magazines, the same argument used against the students in *Grogan* can now be extended to others to prevent any information about abortion from reaching the Irish public.²²⁷ Already,

221. GB-INNO, Case C-362/88, [1990] E.C.R. 667, [1991] 2 C.M.L.R. 801.

222. See Opinion of Advocate General Van Gerven, *Grogan*, [1991] E.C.R. at ___, Common Mkt. Rep. (CCH) [1991] 2 CEC at 560 (stating right to receive services includes right to receive information even where information comes from one who is not acting on behalf of provider of services).

223. *But see* WORLD PRESS REVIEW, Dec. 1990, at 46 (noting that number of Irish women traveling to England and Wales continues to rise despite restriction); *Open Door Counselling Ltd. and Dublin Well Woman Centre, Ltd. v. Ireland*, Joined Cases 14234-35/88, slip op. at 9 (Eur. Comm'n H.R. Mar. 7, 1991). This may be explained, however, by the possibility that information distributed before the ban may still be available.

224. *Open Door Counselling*, slip op. at 9.

225. Ashton, *supra* note 118, at 10.

226. *Id.*; see *Open Door Counselling*, slip op. at 9.

227. See Frankel, *supra* note 104, at A18 (citing noted author Conor Cruise O'Brien: "[I]f you follow [SPUC's] logic, you'll have to ban the London telephone book because it gives you the phone numbers of the abortion clinics."); see also CON-

Irish editions of *Cosmopolitan Magazine* have stopped carrying information on abortion based on the decisions by Irish courts.²²⁸

Pregnant women residing in Ireland should have the right, under Article 59, to travel to England to receive abortion services.²²⁹ As a corollary to that right, women in Ireland should have the right to receive information regarding clinics in other Member States. This right to receive information must give rise to rights under Community law to distribute information.

B. *Derogation from the Treaty*

Even if the students' activities were protected by Community law as a corollary to the right to receive abortion services, Ireland could derogate from Articles 59 and 60 to protect an objectively justified public policy imperative.²³⁰ The Court of Justice emphasizes the need for the Member States to pursue aims which are justified under the Treaty.²³¹ If a national objective deliberately or inadvertently conflicts with the Treaty, especially regarding the establishment of the internal market, the national objective must give way.²³² Therefore, the Court of Justice requires that the national rule not conflict with free trade any more than is necessary for the achievement of the national objective.²³³

The Court of Justice interprets strictly the scope of the

NEXIONS, REPRODUCTIVE RIGHTS: THE GLOBAL FIGHT 31 (1989) (suggesting Irish courts' interpretation of eighth amendment would preclude women from giving abortion information to closest friend without risk of prosecution); Friedman, *supra* note 136, at 77 (proposing that Irish courts' interpretation of eighth amendment would preclude political action to repeal amendment in future). Moreover, several Member States have begun to censor material destined for Ireland.

228. See Parliamentary Resolution on Abortion, O.J. C 96/19 (1990)

229. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. __, __, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 579. It is not a criminal offence to obtain an abortion abroad or to travel abroad for that purpose. *Id.*; see *Open Door Counselling*, slip op. at 12.

230. See *supra* notes 48-83 and accompanying text (discussing derogation from the Treaty); see also Opinion of Advocate General Van Gerven, *Grogan*, [1991] E.C.R. at __, Common Mkt. Rep. (CCH) [1991] 2 CEC at 576 (recommending that Court of Justice conclude that Ireland's ban on information does not violate Treaty based on public policy derogation).

231. Opinion of Advocate General Van Gerven, *Grogan*, [1991] E.C.R. at __, Common Mkt. Rep. (CCH) [1991] 2 CEC at 565.

232. *Id.*

233. *German Insurance*, Case 205/84, [1986] E.C.R. 3755, 3803, [1987] 2

public policy derogation.²³⁴ A Member State cannot determine the scope of the policy derogation unilaterally, although policies may vary among Member States.²³⁵ First, the restriction must be objectively justified to protect an imperative policy interest. Second, Ireland's action must be "proportional" or narrowly tailored to its policy goal. Finally, the restriction must not unjustifiably discriminate, either overtly or covertly, on the basis of nationality.²³⁶

1. Validity of Ireland's Public Policy Objective

Although Ireland's policy objective may be motivated by a moral conviction against abortion, it cannot be deemed valid to the extent that it aims to impose its own moral convictions on another Member State, any more than another Member State could impose its moral standards on Ireland.²³⁷ This policy interest limits, to some extent, the rights granted by Articles 59 and 60.²³⁸ For example, Ireland's public policy argument would undoubtedly justify excluding a doctor who intended to offer abortion services in Ireland, or prohibiting information regarding the availability of illegal abortions within Ireland. These situations are closely analogous to *Torfaen Borough Council v. B & Q plc*,²³⁹ in which the Court of Justice held that the United Kingdom could derogate from Article 30 to prohibit shops from opening on Sundays for "socio-cultural" reasons.²⁴⁰

A state's public policy concerns do not extend beyond its own boundaries. For example, no principle in Community law

C.M.L.R. 69, 102 (noting that derogation is only valid where same results cannot be achieved by less restrictive means).

234. See *supra* notes 50-71 and accompanying text (discussing public policy derogation).

235. Opinion of Advocate General Van Gerven, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. —, —, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 566; see *supra* notes 50-71 and accompanying text (discussing public policy derogation).

236. See *supra* notes 68-83 and accompanying text (discussing discrimination).

237. IR. CONST. art. 40.3.3; see *supra* notes 93-103 (discussing historical background of Irish abortion law).

238. See *supra* notes 48-83 and accompanying text (discussing public policy derogation).

239. Case C-145/88, [1989] E.C.R. 3851, [1990] 1 C.M.L.R. 337.

240. See *supra* notes 56-58 and accompanying text (discussing *Torfaen Borough Council v. B & Q plc*, Case C-145/88, [1989] E.C.R. 3851, [1990] 1 C.M.L.R. 337).

would allow Ireland to prevent a doctor from performing an abortion procedure in another Member State, regardless of Ireland's strong public policy. Similarly, SPUC and the Irish government admitted in the *Grogan* proceedings that they would not be able to prevent women from traveling to another Member State to obtain an abortion.²⁴¹ The injunction, however, seeks to impede access to abortions taking place in England by denying information which is essential for some women to take advantage of services available in England. Insofar as it obstructs access to a legal service offered in another Member State, the policy objective should not be considered valid.

In addition, the free circulation of newspapers and magazines that contain the same information as that published by the students²⁴² undermines Ireland's argument that Ireland has a strong public policy against the publication of such information.²⁴³ In *Conegate, Ltd. v. H.M. Customs & Excise*,²⁴⁴ the Court of Justice held that the ban on the import of pornographic material was contrary to Community law because the material was permitted in certain regions of the country.²⁴⁵ To support an argument for derogation from the Treaty based on the need to protect an imperative policy interest, the Court stated, the United Kingdom would have to show a consistent policy against the material. Ireland's injunction against the students in *Grogan* is similarly untenable. Ireland asserted that the information published by the students violated the Eighth

241. See Opinion of Advocate General Van Gerven, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. __, __, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 558; see also Parliamentary Resolution, *supra* note 211, O.J. C 106/113 (1991). The European Parliament's resolution concerned the actions of the German border police who forced women suspected of having had abortions in the Netherlands to undergo gynecological exams. *Id.*; see Friedman, *supra* note 136, at 72. Mr. Friedman notes that since the Irish prohibition on abortion does not appear to have extraterritorial effect, it is not unlawful to have an abortion abroad. *Id.* Therefore, Mr. Friedman continues, "it strains logic, as well as any minimal conception of free expression, to prohibit persons from speaking of such activities." *Id.*

242. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, 1989 I.R. 760, 771 (Ir. S.C.). But see *supra* note 228 and accompanying text (noting *Cosmopolitan Magazine's* self-censorship as possible trend).

243. See *Conegate, Ltd. v. H.M. Customs & Excise*, Case 121/85, [1986] E.C.R. 1007, [1986] 1 C.M.L.R. 739.

244. *Id.*

245. *Id.*

Amendment because it mentioned the availability of legal abortion services in England.²⁴⁶ Nevertheless, Ireland permits the same information, contained in other sources, to circulate freely. Such an inconsistent policy does not support Ireland's derogation argument.

2. Proportionality of the Means Used to Protect Ireland's Policy

Even assuming the validity of Ireland's policy objective, however, any restriction on the free exchange of services must not have effects beyond what is necessary to protect the objective. Under Community law, the means used to achieve a public policy objective must be proportional to the goal sought. The proportionality principle has two aspects. First, the restriction must be necessary to achieve the valid policy objective, and must not be capable of fulfillment by less restrictive means. Second, the restriction cannot be disproportionate to the aim sought.²⁴⁷

In *Grogan*, the valid policy objective should be defined as protecting the right to life of the fetus in Ireland, with due regard for the life of the mother, as mandated by the Constitution.²⁴⁸ A total ban on the publication or distribution of information is not the least restrictive means to achieve this objective. For example, in certain circumstances, perhaps where a woman's life is threatened by pregnancy, women may be able to receive an abortion in Ireland even under Irish law.²⁴⁹ These women should have access to information regarding abortion services offered not only in Ireland, but in other Member States. By restricting distribution of the student handbooks to doctors, Ireland could have ensured that the handbooks were limited to these women.²⁵⁰ The injunction is-

246. *Grogan*, 1989 I.R. at 764.

247. See *supra* notes 64-67 and accompanying text (discussing proportionality).

248. IR. CONST. art. 40.3.3.

249. See *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, 1989 I.R. 760, 770 (Ir. S.C.) (noting submission by counsel for defendants); see *CASEY*, *supra* note 88, at 314. In addition, those women whose lives are not endangered have the right to travel to England for abortion services. Opinion of Advocate General Van Gerven, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. —, —, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 558.

250. See, e.g., *Quietlynn Ltd. v. Southend Borough Council*, Case 23/89, [1990]

sued, however, prohibited the very publication of the information,²⁵¹ despite the fact that dissemination could have been restricted to medical personnel. To draw an analogy to *Torfaen*,²⁵² it would be as if the Court of Justice permitted the United Kingdom to ban all information regarding the possibility of Sunday shopping in France in order to prevent its nationals from circumventing the United Kingdom's public policy.²⁵³ In view of the Court of Justice's holding in *GB-INNO*,²⁵⁴ such a restriction on information would probably conflict with the Treaty. Despite close analogy to the cases regarding goods, and the overbroad effect of Ireland's ban on information, however, the Court of Justice allowed the ban to remain in effect, ostensibly based on the students' lack of standing, not on public policy concerns.²⁵⁵

A more appropriate method of protecting Ireland's policy would be to control the quality or content of information regarding abortion to ensure that those women who choose to have an abortion in England do so with full knowledge of other possibilities.²⁵⁶ The handbooks distributed by the students in *Grogan* did not encourage abortion, but only presented abortion as one option available, with no mention of illegal options.²⁵⁷ In fact, the Irish Supreme Court in *Grogan* not only agreed that the students' handbook was non-directive, but also commended the students for explaining the options for women who wish to carry the child to term.²⁵⁸

It is unfortunate that the Court of Justice's failure to ad-

E.C.R. —, [1990] 3 C.M.L.R. 55 (holding that Member State could limit sale of pornographic material to licensed shops).

251. *Grogan*, [1991] E.C.R. at —, Common Mkt. Rep. (CCH) [1991] 2 CEC at 579.

252. *Torfaen Borough Council v. B & Q plc*, Case 145/88, [1989] E.C.R. 3851, [1990] 1 C.M.L.R. 337.

253. See *supra* notes 56-58 (discussing *Torfaen*).

254. *GB-INNO-BM*, Case C-362/88, [1990] E.C.R. 667, [1991] 2 C.M.L.R. 801.

255. Opinion of Advocate General Van Gerven, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. —, —, Common Mkt. Rep. (CCH) [1991] 2 CEC 539, 579.

256. See *supra* note 112 (noting that many Member States require counselling regarding alternatives to abortion).

257. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, 1989 I.R. 760, 766-67 (Ir. S.C.); see Friedman, *supra* note 136, at 72 (noting it is not illegal for Irish women to go abroad for abortion).

258. *Id.*

dress the issue allows Ireland to continue to obstruct women from traveling to England for abortions, by banning all information, despite the government's admission that it could not directly block women.²⁵⁹ Prohibiting the publication of objective material which is vital to the health of Irish women who are considering abortion is clearly not the least restrictive means to guard Ireland's domestic policy. This total ban, therefore, is disproportionate to Ireland's objective. Ireland should not be allowed to keep its citizens ignorant in order to prevent them from exercising fundamental rights guaranteed by the Treaty.

3. Discrimination

Although the ban on information applies equally throughout Ireland and does not appear to discriminate against the nationals of other Member States, the effect of the ban is potentially discriminatory in limited circumstances. Arguably, unlike the restrictions in *Luisi and Carbone*,²⁶⁰ no service offered in Ireland benefits from the ban on information about abortion services in England. The Irish Supreme Court recognized, however, that in some cases, the Irish Constitution may permit abortion,²⁶¹ perhaps in order to save the life of the pregnant woman. In that situation, the ban on information might limit pregnant women to consideration of doctors in Ireland, to the exclusion of doctors outside of Ireland who are likely to be more experienced in the procedure. In those limited circumstances, therefore, the ban on information has a discriminatory effect analogous to that condemned by the Court of Justice in *Luisi and Carbone* where the Court found that Italy's limits on capital export benefitted Italian services to the detriment of services offered in other Member States.²⁶² The existence of

259. See *Grogan*, 1989 I.R. at 771; see also Parliamentary Resolution, *supra* note 211, O.J. C 106/113 (1991) (noting internal borders should not be used to threaten women for exercising legal right to get abortion in Netherlands). If it is not illegal to go to England for an abortion, merely speaking of such action cannot justifiably constitute an offence. See, Friedman, *supra* note 136, at 79-80. The result of the decision in *Grogan*, therefore, will not be that women will stop going to England for abortion, but that they will go in ignorance. See *id.* at 83.

260. *Luisi and Carbone v. Ministero del Tesoro*, Joined Cases 286/82 & 26/83, [1984] E.C.R. 377, [1985] 3 C.M.L.R. 52.

261. See CASEY, *supra* note 88, at 314.

262. See *supra* notes 68-71 (discussing *Luisi and Carbone*).

discrimination is not determinative;²⁶³ however, when it is coupled with the disproportionality of the policy, a strong argument can be advanced that Ireland's national policy banning information on abortion is beyond the scope of a justifiable public policy derogation, notwithstanding the State's strong public policy against abortion.

In addition to suggesting a procedure contrary to the principle of the supremacy of Community law,²⁶⁴ the Irish injunction directly violates Article 59 of the Treaty by imposing a new restriction on the flow of services.²⁶⁵ Both the students in *Grogan* and the clinics in *Open Door Counselling* undertook the activities in question unimpeded until the Eighth Amendment was enacted.²⁶⁶ Based on that new amendment, enacted after the Treaty, SPUC was able to win judgments suspending the activities of the students and the clinics. Such unilateral action by a Member State passing new restrictions on the free flow of services is prohibited by Article 59²⁶⁷ as well as by the Court of

263. See *supra* notes 68-83 (discussing discrimination).

264. It is well established that Community law takes precedence over contrary national law, including "fundamental rights as formulated by the constitution of that state." IHG, Case 11/70, [1970] E.C.R. 1125, 1134, [1972] C.M.L.R. 255, 283; see *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, Case C-213/89, [1990] E.C.R. 2433, [1990] 3 C.M.L.R. 1; see also Jay J. Aragonés, Comment, *Regina v. Secretary of State for Transport ex parte Factortame Ltd.: The Limits of Parliamentary Sovereignty and the Rule of Community Law*, 14 FORDHAM INT'L L.J. 778, 781-87 (1990-1991) (discussing Court of Justice's view of supremacy of Community law). In *Costa v. ENEL*, the Court of Justice clearly stated that the Treaty created a new legal order whose norms cannot be overridden by subsequent national law. *Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585, 593-594, [1964] C.M.L.R. 425, 456. Nevertheless, the Court of Justice in *Grogan* did not challenge the Irish Supreme Court's assertion that the Eighth Amendment, because it was later in time, might modify the Treaty. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, 1989 I.R. 760, 768 (Ir. S.C.). The Irish Supreme Court also stated that determination of that question could only be decided by the national court. *Id.*; see Walsh, *supra* note 85, at 817 (stating integration of Community law on fundamental rights into Irish law might compel Ireland to leave Community). These assertions by the Supreme Court are clearly contrary to the principles of Community law. Moreover, allowing a Member State to amend Treaty provisions unilaterally threatens the integration of the Community. See *supra* note 85 and accompanying text (discussing danger of unilateral action by Member State).

265. EEC Treaty, *supra* note 1, art. 59. The Irish Supreme Court based its finding that the status quo ante was the illegality of the publication of information regarding information on the availability of abortion services in England on *Open Door Counselling* and the Eighth Amendment. *Grogan*, 1989 I.R. at 764.

266. *Open Door Counselling Ltd. and Dublin Well Woman Centre v. Ireland*, Joined Cases 14234 & 14235/88, slip op. at 11 (Eur. Comm'n H.R. Mar. 7, 1991).

267. EEC Treaty, *supra* note 1, art. 59.

Justice's jurisprudence.²⁶⁸

C. *The Court of Justice Avoided Resolving a Clear Conflict of Rights*

The Court of Justice's main justification for upholding the validity of Ireland's ban on information was the absence of a link between the students distributing the literature and the clinics providing the services. The Court, however, has never previously discussed the necessity of this link. Prior to *Grogan*, the Court of Justice focused on the rights of the recipient of services and the purchaser of goods. The Court generally had sought to remove any obstruction, direct or indirect, actual or potential,²⁶⁹ which hindered access to goods and services.

By creating the link theory, the Court of Justice removed *Grogan* from the scope of the Treaty.²⁷⁰ The Court reasoned that without a link to the economic operator, and without receiving consideration for their activities, the students were neither the providers nor the recipients of services, and therefore not entitled to Treaty protection.²⁷¹ The Court shifted the focus away from the Irish women, who, as recipients of services, are hindered by the ban on information. Because of this reformulation of the issue, the Court was able to avoid the question of fundamental rights which it otherwise would have been obliged to address.²⁷²

The Court of Justice has consistently held that fundamen-

268. See *supra* notes 12-23 and accompanying text (discussing Court of Justice's interpretation of Articles 59-60); see also *supra* note 85 and accompanying text (discussing danger of unilateral action by Member State).

269. *Procureur de Roi v. Dassonville*, Case 8/74, [1974] E.C.R. 837, 852, [1974] 2 C.M.L.R. 436, 453-54. The *Dassonville* Court stated that "[a]ll trading rules . . . which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions." *Id.* Although the test set forth in *Dassonville* was modified by *Cassis de Dijon*, Case 120/78, [1979] E.C.R. 649, [1979] C.M.L.R. 494, the definition of an obstruction which contravenes the Treaty as "indirect" or "potential" remains valid. See, e.g., *GB-INNO-BM*, Case C-362/88, [1990] E.C.R. 667, [1991] 2 C.M.L.R. 801.

270. See *supra* notes 84-91 (discussing Court of Justice's jurisdiction in area of fundamental rights).

271. *Society for the Protection of Unborn Children Ireland Ltd. v. Grogan*, Case C-159-90, [1991] E.C.R. ___, *Common Mkt. Rep. (CCH)* [1991] 2 CEC 539, 579.

272. See *supra* notes 84-91 (discussing Court of Justice's jurisdiction in area of fundamental rights).

tal rights form an integral part of Community law.²⁷³ Member States must ensure that the Community laws they implement are compatible with fundamental rights, as determined by the Court of Justice by examining the Human Rights Convention and the constitutional traditions of the Member States.²⁷⁴ Once a case falls within the scope of the Treaty, the Court must address the fundamental rights conflict.²⁷⁵ The Court, however, has no power to examine the compatibility of national legislation which falls outside the scope of Community law with the Human Rights Convention.²⁷⁶ The link theory thus placed the issue outside the scope of the Treaty and permitted the Court of Justice to decline to resolve the fundamental rights conflict.

1. Compatibility of the Ban on Abortion Information and the Right to Freedom of Expression

In *Grogan*, two rules deriving from fundamental rights came into conflict. First, Article 10 of the Human Rights Convention guarantees every Member State national "the right to hold opinions and receive and impart information and ideas" without state interference.²⁷⁷ The right may be restricted as "prescribed by law," however, provided the restrictions are "necessary in a 'democratic society'" to protect the public.²⁷⁸ Second, the Eighth Amendment to the Irish Constitution provides that Ireland must acknowledge the right to life of the fe-

273. See, e.g., Opinion of Advocate General Van Gerven, *Grogan*, [1991] E.C.R. at —, Common Mkt. Rep. (CCH) [1991] 2 CEC at 568; *Nold v. Commission*, Case 4/73, [1974] E.C.R. 491, [1974] 2 C.M.L.R. 338.

274. *Wachauf v. Germany*, Case 5/88, [1989] E.C.R. 2609, [1991] 1 C.M.L.R. 328; see *supra* notes 87-90 and accompanying text (discussing that Court determines fundamental rights by considering those rights enunciated in European Convention on Human Rights and constitutions of Member States).

275. *Nold*, [1974] E.C.R. at 507, [1974] 2 C.M.L.R. at 354.

276. *Demirel v. Stadt Schwäbisch Gmünd*, Case 12/86, [1987] E.C.R. 3719, [1989] 1 C.M.L.R. 421. A public policy based decision, recognizing the students' activities as constituting a necessary corollary to the free exchange of services, but allowing a derogation based on public policy, seems more consistent with the Court's precedents. However, such a decision would have eased the strict definition of public policy concerns which the court has developed. A broad public policy definition would allow a larger number of derogations by the Member States, slowing the formation of the internal market.

277. Human Rights Convention, *supra* note 6, art. 10.

278. *Id.* A similar provision was established in article 5 of the joint declaration of the European Parliament, the Council and the Commission, O.J. C 103/1 (1977).

tus "with due regard to the equal right to life of the mother" only "insofar as is practicable."²⁷⁹ Neither the right to life of the fetus under Irish law nor the right to freedom of expression under the Convention on Human Rights, of course, is absolute. An analysis of the conflict would compel the Court to balance the importance of these rights to determine how much of one right can be sacrificed to protect the other right.²⁸⁰

The Irish law, giving equal regard to the right to life of the woman, may in certain cases allow a woman to abort the fetus for her own safety. In this situation, a woman would be entitled to choose the most appropriate clinic for her needs. To do so, the woman would need information such as that distributed by the students, particularly because the doctors in other Member States, where abortion is legal, are likely to be more experienced in the procedure. Moreover, the amendment specifies protection only insofar as is practicable.²⁸¹ Arguably, ordering an injunction which violates the existing right to receive the information granted by the Human Rights Convention is not "practicable."²⁸² This is more apparent when one considers that the right to life of the fetus can be protected in Ireland by means which would not violate the right to freedom of expression, or at least would restrict it to a lesser degree.²⁸³

The right to receive and impart information, guaranteed by the Human Rights Convention, is similarly qualified.²⁸⁴ The right to receive and impart information is subject to restrictions that are prescribed by law.²⁸⁵ The Commission of

279. IR. CONST. art. 40.3.3. *But see* Friedman, *supra* note 136, at 76 (suggesting that amendment is worded to guarantee confusion and paradox).

280. The Court of Justice is not unfamiliar with this balancing procedure. As the Advocate General in *Grogan* noted, the analysis is similar to that engaged in to determine the proportionality of a Member State's restriction with the public policy objective sought. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Case C-159/90, [1991] E.C.R. —, —, [1991] 2 CEC 539, 563. Moreover, the Court has previously been called on to balance the fundamental right to property against Community interest in economic stability. *See, e.g., Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] E.C.R. 3727, [1980] 3 C.M.L.R. 42.

281. IR. CONST. art. 40.3.3.

282. *See* Human Rights Convention, *supra* note 6, art. 10; *see also* IR. CONST. art. 40.3.3.

283. *See supra* note 250 and accompanying text (discussing less restrictive measures).

284. Human Rights Convention, *supra* note 6, art. 10.

285. *Id.*

Human Rights noted, however, that two requirements derive from the phrase "prescribed by law."²⁸⁶ First, the restriction must exist in a form that is adequately accessible.²⁸⁷ Second, the legal consequences of an action must be foreseeable in order to allow the individual to act accordingly.²⁸⁸

The European Commission on Human Rights, addressing the conflict between the right to life of the fetus and the right to free expression raised in *Open Door Counselling*, found that the Irish information ban was not permissible under Article 10 because at the time the clinics were advising clients of abortion services available in England, the restriction of their activity was not "accessible" in any precise form, nor were the consequences of the clinics' actions foreseeable.²⁸⁹ Because *Open Door Counselling* was still on appeal at the time the students in *Grogan* distributed the handbooks, the validity of the ban on information arguably had not yet been determined. Therefore, the government's action banning the information published by the students, insofar as the publication was not yet prohibited by law, was invalid under Community law as it is well established that a national provision which is not compatible with Community law is invalid.²⁹⁰ At a minimum, the Court of Justice should have held that the students could not have violated a ban on information which did not yet exist at the time of their activities.

Moreover, even if the ban could be seen as accessible following the Supreme Court's decision in *Open Door Counselling*,²⁹¹ the consequences with regard to the students were hardly foreseeable. As the Supreme Court noted in *Grogan*, the same information published by the students was available in newspapers and magazines that circulated freely in Ireland. The law as articulated by the Supreme Court was aimed at counsellors and doctors, not publicists. The students' activities seem more analogous to the activities of a magazine than a

286. *Open Door Counselling Ltd. and Dublin Well Woman Centre v. Ireland*, Joined Cases 14234-35/88, slip op. at 11 (Eur. Comm'n H.R. Mar. 7, 1991).

287. *Id.*

288. *Id.*

289. *Id.* at 13.

290. *Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585, 456, [1964] C.M.L.R. 425, 593-94.

291. *Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd. v. Ireland*, Joined Cases 14234-35/88, slip op. at 12 (Eur. Comm'n H.R. Mar. 7, 1991).

counsellor. It is not unreasonable to assert that they were unaware of the possible consequences of their actions.

Finally, to protect the right to freedom of expression in the Community in the future, particularly in Ireland, the Court of Justice should have recognized that even if the right to impart information regarding abortion was clearly articulated at the time of the students' activities, the injunction would be invalid under the general principles of Community law. In balancing the right to life of the fetus against the right to freedom of expression, the Court should have noted that under the constitutional traditions of every other Member State abortion is permitted, albeit with varying degrees of legal restriction.²⁹² Moreover, neither the Commission of Human Rights nor the Court of Justice recognizes the right to life of the fetus.²⁹³

Freedom of expression, in contrast, is protected as vital by the Human Rights Convention²⁹⁴ and recognized by all the Member States, including Ireland.²⁹⁵ Interference with freedom of expression is only justified when "necessary in a democratic society."²⁹⁶ Ireland claims the ban on information is necessary, yet admits that the same information reaches the public through other sources.²⁹⁷ Either Ireland plans to censor those other sources, or does not consider the information a threat to its society.²⁹⁸ If it directs the ban against the media, Ireland will likely cross the line of proportionality established by the Court of Justice. The importance of objective informa-

292. See *supra* notes 104-14 and accompanying text (discussing European abortion laws).

293. See, e.g., *Open Door Counselling*, slip op. at 11; see also European Parliament, Resolution on Abortion, O.J. C 96/19 (1990) (condemning Ireland's decisions regarding abortion and calling for legalization to prevent "abortion tourism" and improve women's health). For a decision regarding abortion in the European Commission of Human Rights, see *Paton v. United Kingdom*, Case 8416/78, 3 E.H.R.R. 408 (noting in dictum that fetus does not have absolute right to life).

294. *Open Door*, slip op. at 13.

295. IR. CONST. art. 40.6.1; see Eamonn Hall & Patrick McGovern, *Regulation of the Media: Irish and European Community Dimensions*, 8 DUBLIN U. L.J. 1, 23 (1986) (noting essential character of impartial dissemination of information in Ireland).

296. Human Rights Convention, *supra* note 6, art. 10.

297. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, 1989 I.R. 760, 771 (Ir. S.C.).

298. See *Conegate, Ltd. v. H.M. Customs & Excise*, Case 121/85, [1986] E.C.R. 1007, [1986] 1 C.M.L.R. 739 (finding United Kingdom did not prove imperative policy interest in banning pornographic material because it could circulate in certain parts of country).

tion to a woman who plans to get an abortion abroad—as she is legally entitled to do—outweighs Ireland’s weak interest in preventing the student publication.

2. Socio-Cultural Conformity in the Community

Some commentators believe that decisions forcing social conformity are unnecessary for economic union.²⁹⁹ The objective of the Treaty, they argue, is not to homogenize the Community in every social and political aspect, but to create an economic union that will benefit the Member States while allowing them to preserve their unique cultural attributes. According to this argument, the Court of Justice should harmonize national laws only to the extent necessary to ensure economic union. The Court of Justice, to some extent, seems to support this view. For example, the Court upheld Ireland’s requirement that its full-time public school teachers speak Gaelic, despite the discriminatory effect the requirement had on teachers from other Member States.³⁰⁰

The Court has not hesitated, however, to deny the “socio-cultural” justifications for derogation from the Treaty where the restrictions imposed by a Member State threatened the vitality of intra-Community trade. For example, in *Bond Van Adverteers v. Netherlands*, the Court recognized the Netherlands’ interest in maintaining the “non-commercial, pluralistic” nature of its broadcasting system.³⁰¹ The Court noted, however, that the prohibitions of advertising and broadcasting placed on cable operators receiving transmissions from outside the Netherlands hindered the free flow of services and discriminated against the providers of services established in other Member States.³⁰² Despite the Netherlands’ public policy goal, the Court thus concluded that the restrictions could not be justified on the grounds of a public policy derogation.³⁰³

In a more controversial decision, the Court of Justice refused to allow the United Kingdom to bar the importation of

299. Anthony Blinken, *Womb for Debate*, *NEW REPUBLIC*, July 8, 1991, at 12.

300. *Groener v. Minister of Education and City of Dublin Vocational Education Committee*, Case 379/87, [1989] E.C.R. 3967, [1990] 1 C.M.L.R. 401.

301. *Bond Van Adverteers v. Netherlands*, Case 352/85, [1988] E.C.R. 2085, 2135, [1989] 3 C.M.L.R. 113, 151.

302. *Id.* at 2136, [1989] 3 C.M.L.R. at 152.

303. *Id.*

pornographic items, despite the United Kingdom's public policy objection, where a lawful trade in the same goods existed within the United Kingdom.³⁰⁴ The Court has refused to recognize strong public policy justifications for derogation from the Treaty in the past, where the imposed restriction hindered intra-Community trade. It should not have hesitated to find that Ireland's ban on abortion information violated the Treaty, insofar as it impacted negatively on services offered by other Member States.

CONCLUSION

The prohibition of abortion within Ireland is a matter for national determination. The Community should not interfere in Ireland's laws protecting the right to life of the fetus. Nevertheless, when national rules unnecessarily hinder intra-Community trade, as does the ban on information regarding the availability of abortion services in another Member State, the matter concerns the entire Community.

The Court of Justice determined that abortion is a service within the meaning of the Treaty and has previously recognized that corollary rights are necessary to insure the free movement of services.³⁰⁵ In the area of goods, which is analogous to services, the Court recognizes that the consumer's access to information is essential to free movement.³⁰⁶ It is unfortunate that the Court in *Grogan* did not clearly recognize that Irish consumers have a right to receive information regarding services available in England. Such a decision would not contradict Ireland's right to regulate abortion within its borders, and would be consistent with Community law as well as with the general principles established in the Human Rights Convention.

304. *Conegate, Ltd. v. H.M. Customs & Excise*, Case 121/85, [1986] E.C.R. 1007, [1986] 1 C.M.L.R. 739.

305. *Luisi and Carbone v. Ministero del Tesoro*, Joined Cases 286/82 & 26/83, [1984] E.C.R. 377, [1985] 3 C.M.L.R. 52.

306. *See GB-INNO*, Case C-362/88, [1990] E.C.R. 667, 689, [1991] 2 C.M.L.R. 801, 816.

POST SCRIPTUM

As this Comment went to print, the controversy surrounding the Eighth Amendment re-emerged in reaction to the plight of a fourteen-year-old victim of an alleged rape¹ who was restrained by the High Court from leaving Ireland for nine months.² The decision sparked protests throughout Ireland, and led to demands for revision of the Eighth Amendment to allow for a limited right to abortion.³ In a one-line decision, the Supreme Court lifted the injunction, allowing the girl to leave Ireland.⁴ Although the Supreme Court's decision solved the immediate crisis, demands for a new referendum to revise the Eighth Amendment are likely to continue.

*Cathleen M. Colvin**

1. The girl was allegedly raped by the father of a friend. *Agony of Rape Victim Who Wanted to End it All*, *IR. INDEPENDENT*, Feb. 18, 1992, at 1. On February 5, the girl and her family decided to go to London to get an abortion for her. The family asked the police if a DNA test of the fetus could be used to prove the identity of the rapist. *Id.* The family then went to London, but returned without having obtained the abortion after they had been advised by the Irish police that the Advocate General had issued an injunction prohibiting such action. *Id.* The Advocate General's interim injunction was subsequently upheld by the High Court. *Id.*

2. "A Duty to Protect Life," *IR. INDEPENDENT*, Feb. 18, 1992, at 8 (reprinting full text of High Court decision). The High Court asserted that compelling the girl to bear the child of the alleged rapist by preventing her from leaving the country was justified, under Community law, based on a public policy derogation. *Id.*

3. Joseph O'Malley, *Two-Thirds Now Want Abortion Law Change*, *IR. INDEPENDENT* (Sunday ed.), Feb. 23, 1992, at 1.

4. James Clarity, *Irish Court Says Girl Can Leave to Obtain Abortion*, *N.Y. TIMES*, Feb. 27, 1992, at 1.

* J.D. Candidate, Fordham University, 1992.