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Abortion in International Waters Off the Coast of Ireland: Avoiding a Collision between Irish Moral Sovereignty and the European Community

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COMMENTS

ABORTION IN INTERNATIONAL WATERS OFF THE COAST OF IRELAND: AVOIDING A COLLISION BETWEEN IRISH MORAL SOVEREIGNTY AND THE EUROPEAN COMMUNITY

Allison M. Clifford*

I. Introduction	386
II. Overview of Irish Abortion Law	395
A. Abortion and the Irish Constitution Prior to the 1983 Amendment	395
B. Abortion and the Right to Travel Prior to the 1992 Travel Amendment	398
1. First Information Case: <i>SPUC v. Open</i> <i>Door</i>	399
2. Second Information Case: <i>SPUC v.</i> <i>Grogan</i>	402
3. Protocol No. 17 to the Maastricht Treaty ..	405
4. The <i>X Case</i>	406
5. The Solemn Declaration	409
C. The 1992 Travel Amendment to the Irish Constitution	412
D. The <i>C Case</i>	413
E. Summary of Current Irish Abortion Law	416
III. Women on Waves: A Failed Test Case?.....	416

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IV. Enjoining Abortion in International Waters and the Travel Amendment	420
V. Enjoining Abortion in International Waters and the Application of Protocol No. 17	422
VI. Enjoining Abortion in International Waters: Permissible Derogation of European Community Law	424
A. Women on Waves is not a "Legitimate" Service Provider Argument	426
B. Public Policy Exception Argument	427
1. A Travel Injunction Relies on Imperative Requirements of Public Interest	428
2. A Travel Injunction is not Incompatible with the Aims of the European Community Treaty	430
3. A Travel Injunction Passes the Proportionality Test	430
VII. Conclusion.....	431

I. INTRODUCTION

In June 2001, members of a Dutch non-for-profit organization called Women on Waves,¹ set sail for Ireland in what they intended to be the world's first floating abortion clinic.² This venture, which was the brainchild of Dutch physician Rebecca Gomperts, brought the Irish abortion debate back into international headlines.³ Dr. Gomperts, a seasoned activist,⁴ was moti-

¹ See generally Women on Waves at <http://www.womenonwaves.org> (last visited Oct. 11, 2002). See also Women on Waves Ireland (Women on Waves' partner organization in Ireland) at <http://www.womenonwaves.net/ireland/index.html> (last visited Oct. 11, 2002).

² See generally Jennifer Askin, *Abortion Controversy Takes to the Seas*, ABC News, Apr. 20, 2001, http://abcnews.go.com/sections/world/DailyNews/netherlands/010420_abort.html; Charles Trueheart, *Doctor Plans Offshore Abortions; Ship Would Anchor Outside Territory Where Procedure is Illegal*, THE WASH. POST, June 16, 2000, at A20.

³ See Alissa Quart, *Newsmaker: Rebecca Gomperts*, MS MAGAZINE.COM, May 11, 2000, <http://www.msmagazine.com/news/uswirestory.asp?id=6129>; Leslie Berger, *Doctor Plans Off-Shore Clinic for Abortions*, N.Y. TIMES, Nov. 21, 2000, at F7; Sarah Corbett, *The Pro-Choice Extremist*, N.Y. TIMES MAGAZINE, Aug. 26, 2001, § 6 at 22.

⁴ Dr. Gomperts previously was a resident doctor aboard Greenpeace's Rainbow Warrior boat, which was sunk by the French government in 1991 after challenging France's nuclear interests. After leaving Greenpeace, Dr. Gomperts

vated by what she regarded as “the ‘medical calamity’ [of] 20 million abortions worldwide annually resulting in the deaths of 70,000 women.”⁵

The idea was to “buy a ship and sail it around the world, providing abortions at sea for women who could not otherwise get them.”⁶ The Women on Waves agenda was to target countries where abortion is either illegal or highly restricted and transport women into international waters, on a Dutch-registered ship, where first trimester abortions would be offered.⁷ The organization believed that it would not be subject to Irish law because the ship would be flying the Dutch flag, and Dutch law, which permits abortion on demand after a five-day waiting period, would apply. Therefore, abortions performed in international waters would place the otherwise illegal activity beyond the jurisdictional reach of nations where abortion is unlawful.⁸

“served as an abortion provider in the Netherlands, and visited clinics worldwide.” Quart, *supra* note 3. Dr. Gomperts’ activism was inspired by these travels: “[i]n Panama she met a teen who had become a sex worker to support her child [and Gomperts stated] that this encounter ‘would have been enough to make an activist out of most sensitive women.’” *Id.* See also Heleen Van Geest, *Dutch ‘Abortion Ship’ Sets Sail to Offer Treatment for Irish Women*, REUTERS (London), June 12, 2001, at 12.

⁵ ‘Abortion Ship’ Arrives In Ireland, To Fury Of Pro-Lifers, AGENCE FRANCE PRESSE, June 14, 2001. See also Corbett, *supra* note 3.

⁶ Corbett, *supra* note 3. Although this comment is limited to a discussion of whether Ireland could enjoin its nationals from traveling into international waters to procure an abortion, it should be noted that it is far from clear whether domestic abortion laws could not reach into international waters. “Whether international waters are considered outside domestic abortion laws varies from country to country, says University of Richmond law professor John Paul Jones, an expert in comparative constitutional law.” Katarzyna Lyson, *Abortion At Sea, A Dutch Doctor Aims To Launch A Floating Clinic To Help Women End Unwanted Pregnancies Offshore, Out Of Reach Of Their Countries’ Laws*, MOJO WIRE, June 23, 2000, at http://www.motherjones.com/news_wire/sea_change.html. See *infra*, note 34 for various bases of extraterritorial jurisdiction that might apply to Women on Waves.

⁷ See Corbett, *supra* note 3. See also Van Geest, *supra* note 4.

⁸ See Peter Ford, *Banned on Land, But Free at Sea?* CHRISTIAN SCI. MONITOR, June 23, 2000, <http://www.csmonitor.com/durable/2000/06/23/p1s3.htm>. Dr. Gomperts explained how she expected Women on Waves to work:

[The Aurora] will initially visit ports to offer counselling, contraceptive advice and other health services. When enough women have requested abortions, the ship will sail 12 miles out into international waters where the operations will be carried out in a day. As many as 20 abortions could be carried out daily, and the clinic could operate five days a week. Only women up to 12 weeks pregnant will be treated. The clinic will also train local people in abortion practice. The doctor said she had taken legal advice and was confident that, as the surgery would be carried out in inter-

Under international media attention, Women on Waves sailed its vessel, named the *Aurora* (otherwise known as *Sea Change*), to Ireland.⁹ This nation was ripe testing ground for the maiden voyage as it constitutionally¹⁰ and criminally¹¹ pro-

national waters under the Dutch flag and in a Dutch-registered boat, the law of the Netherlands would prevail.

Jacqui Thornton, *Doctor's Floating Clinic to Offer Abortions Offshore*, SUNDAY TELEGRAPH (U.K.), June 11, 2000, reprinted in, 27 WOMEN'S INT'L NETWORK NEWS 23 (Winter 2001). Engaging in otherwise illegal activity in international waters is not a novel concept in itself, as evidenced in the United States by casino boats that operate in international waters off the coastline of certain states. For discussions of gambling in international waters off the coast of the United States, see generally Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy*, 64 MISS L.J. 291 (1995); Robert M. Jarvis, Case Note, *GAMBLING SHIPS: The Antiterrorism and Effective Death Penalty Act of 1996 Does Not Extend the Territorial Sea of the United States for Purposes of the Gambling Ship Act*; *United States v. One Big Six Wheel*, 987 F. Supp. 169, 1998 AMC 934 (E.D.N.Y. 1997), 29 J. MAR. L. & COM. 449 (1998).

⁹ See generally Berger, *supra*, note 3; Kitty Holland & Isabel Conway, *Abortion Ship Unlikely to Face Legal Trouble*, THE IRISH TIMES, June 11, 2001, at 3; Claire Regan, *Abortion Ship Visit to Belfast 'Off Schedule'*, BELFAST TELEGRAPH, June 1, 2001; Isabel Conway, *Dutch Team Faces Jail if Abortions Go Ahead*, THE IRISH TIMES, June 13, 2001, at 8; Van Geest, *supra* note 4; Marlise Simons, *Dutch Ship Offers Abortions; To Make Ireland Its First Call*, N.Y. TIMES, June 11, 2001, at A9; Chris Weinkoft, *The Abortion Boat*, THE HUMAN LIFE REVIEW, Jan. 1, 2001; Ford, *supra* note 8; *Abortion Ship in Stormy Waters*, BBC NEWS, June 14, 2001, http://news.bbc.co.uk/1/hi/english/world/europe/newsid_1389000/1389271.stm.

¹⁰ In a referendum held on September 7, 1983, the people of Ireland voted for the Eighth Amendment to the Irish Constitution, which became Article 40.3.3. and reads:

The State acknowledges the right to life of the unborn, and with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

Art. 40.3.3., Constitution of Ireland, 1937, available at <http://193.178.1.117/upload/publications/297.pdf>. See generally JAMES KINGSTON, ANTHONY WHELAN & IVANA BACIK, *ABORTION AND THE LAW* 5 (1997).

¹¹ Ireland's criminal provision on abortion reads:

Every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whosoever, with intent to procure the miscarriage of any woman, whether or not she be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and on being convicted thereof shall be liable to be kept in penal servitude for life.

Offences Against the Person Act, 24 & 25 Vict., ch. 100, § 58 (1861)(Ir.). This Act was carried over from English law and remains in force today. "When Ireland separated from England in 1921 and became a free State, they drafted their own Con-

hibits abortion. Additional factors making Ireland an attractive site include its geographic proximity to Amsterdam, the existence of an organized Irish abortion rights community and an April 2001 national poll stating that 79 percent of Irish respondents agreed that abortion should be allowed in certain circumstances.¹²

Ireland's history of abortion law has evolved through a series of constitutional amendments and case law, the latter of which has created great uncertainty and confusion, which will be established in the pages ahead. Abortion law in Ireland is further complicated by Ireland's membership in the European Community ("EC"),¹³ which obligates it to recognize the supremacy of EC law when a conflict between Irish and EC law arises.¹⁴ Ireland and the courts of the EC have, to date, carefully avoided a direct confrontation between EC law and Article 40.3.3., Ireland's constitutional provision on abortion.¹⁵ That said, any abortion debate in Ireland must be analyzed in light of Ireland's obligations as an EC member. It is a thesis of this

stitution, providing that all laws previously in force would remain in full force so long as consistent with the 1937 Constitution or until amended or replaced by the Irish Parliament [sic]." Seth S. Stoffregen, Comment, *Abortion and the Freedom to Travel in the European Economic Community: A Perspective on Attorney General v. X*, 28 NEW ENG. L. REV. 543, 556 (1993).

¹² See Corbett, *supra* note 3.

¹³ Ireland became a member of the European Community [hereinafter EC] on January 1, 1973. See Mark L. Jones, *Regional Economic Organizations: Treaty Establishing the European Economic Community (Treaty of Rome)*, 2 BASIC DOCS. INT'L ECON. L. 3 (1994).

¹⁴ The supremacy of EC law:

is confirmed by [A]rticle 189 [currently Article 249], whereby a regulation 'shall be binding' and 'directly applicable in all Member States.' This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

Donald A. MacLean, Note, *Can the EC Kill the Irish Unborn?: An Investigation of the European Community's Ability to Impinge on the Moral Sovereignty of Member States*, 28 HOFSTRA L. REV. 527, 538 (1999).

¹⁵ See *id.* at 528.

The avoidance of conflict has allowed Catholic morality to remain a dominant factor in State abortion law. While some may view this domination as religious fanaticism contrary to the philosophies of personal autonomy and equal rights for women, it is actually a unique example of a conflict being faced by all EC Member States who may be forced to relinquish control of domestic moral issues due to the conveyance of competences, or powers, to a supranational organization.

Id.

comment that Women on Waves, in conjunction with Women on Waves Ireland (its Irish partner organization)¹⁶ were attempting to generate a test case to force the courts of the EC to directly confront the incompatibility between Irish abortion law and EC law.

Women on Waves failed to accomplish its mission in Ireland because it neglected to procure the proper Dutch abortion licensing prior to sailing.¹⁷ Even though the fundamental goal of establishing the legality of offshore abortion was thwarted by Dr. Gomperts' own government declaring her proposed activity illegal,¹⁸ the arrival of the *Aurora* in Ireland resurrected¹⁹ the politically and emotionally charged question of Ireland's jurisdiction over abortion tourism.²⁰ The venture "thrust the [Irish abortion] issue back into the frontline of public debate,"²¹ which was an additional goal of Women on Waves.²²

¹⁶ See *About Women on Waves in Ireland*, at <http://www.womenonwaves.net/ireland/news/about.html> (last visited Oct. 11, 2002). See *infra* note 132 and accompanying text for a discussion of the potential legal effect of the partnership between Women on Waves and Women on Waves Ireland.

¹⁷ See Corbett, *supra* note 3. See also Karen Birchard, *Abortion Boat Faces Legal Complications*, THE LANCET (U.K.), June 23, 2001.

¹⁸ See Corbett, *supra* note 3. The *Aurora* was limited to dockside tours of the facility, which included contraceptive, abortion and sexual education. See Brian Lavery, *Ship Planning to Offer Abortions Makes Waves, but Hits Shoal*, at *Irish Port*, N.Y. TIMES, June 17, 2001, § 1, at 4.

¹⁹ Ireland, in 1992 was directly faced with the issue of abortion tourism and travel in the much publicized X Case. See *infra* note 88 and accompanying text for a discussion of the X Case.

²⁰ Abortion tourism has been defined as "interstate travel for the purpose of abortion." Gerald Neuman, *Extraterritorial Regulation of Abortion: Conflict of Constitutions? No Thanks: A Response to Professors Brilmayer and Kreimer*, 91 MICH. L. REV. 939, 942 (1993).

²¹ *Abortion Ship in Stormy Waters*, *supra* note 9.

²² Joan van Kampen, a spokeswoman for the ship stated, "[w]hat we are really here for is to get attention for the state Irish women are in." Susan Wills, *Ship of Fools*, NATIONAL REVIEW, June 26, 2001. It is interesting to note that even before the Dutch licensing problems were publicly announced, both the Irish authorities and anti-abortion activists were relatively low-key concerning Women on Waves' impending visit to Ireland. "While the *Aurora's* voyage has made news beyond Irish shores, reaction among pro-life campaigners in Ireland has been mostly muted. Many feel that by keeping quiet they will starve the mission of publicity." *Abortion Ship in Stormy Waters*, *supra* note 9. On the other hand, not all countries remained silent regarding state action if targeted by Women on Waves. "On the Mediterranean island of Malta, where abortions are illegal, Social Policy Minister Lawrence Gonzi said in a recent radio interview that criminal action would be taken against anyone organizing or helping to arrange the services that Dr. Gomperts will offer." Ford, *supra* note 8.

In the summer of 2002, it was reported that Women on Waves was preparing to set sail again — this time with Dutch approval for distribution of RU486²³ (“the abortion pill”).²⁴ The Dutch Health Ministry’s approval for the distribution of the abortion pill came after Women on Waves appealed its February 2002 denial of a license to provide first trimester surgical abortions in international waters.²⁵ The Ministry of Health upheld the denial of the surgical abortion license finding that the organization’s proposed activities abroad made it impossible for it to meet two essential requirements under Dutch law: (1) maintaining a contract with a nearby hospital and (2) availing itself to unannounced and continuous health inspections.²⁶ The political complications, that would have arisen had the Dutch authorities licensed surgical abortions, beg the question of whether limiting Women on Waves to distribution of RU486 was an attempted political compromise. Alternatively, this limitation might signal the Ministry of Health’s acknowledgment of the obvious risks associated with performing surgical abortion on the rough seas.²⁷

Rumors that the ship will dock off Malta on its maiden trip provoked outrage and indignation among doctors, clerics and government officials on the island, where 380,000 people live on 122 square miles of rock and the state religion is Roman Catholicism. The leading Catholic bishops on the island issued a statement describing the plan as a ‘monstrosity.’ Lawrence Gonzi, who is deputy prime minister and social policy minister, called the idea ‘horrendous.’ ‘Such a move tries to defy the laws of the country and the values of the society being targeted,’ Gonzi’s spokesman, Alan Camilleri, said ‘[w]e are ready to prosecute any person that colludes or collaborates with the doctor.’

Trueheart, *supra* note 2.

²³ “Mifepristone [RU486] is a drug that blocks a hormone called progesterone that is needed for pregnancy to continue. Mifepristone, when used together with another medicine called misoprostol, is used to end an early pregnancy (49 days or less since your last menstrual period began).” U.S. FOOD AND DRUG ADMINISTRATION, CENTER FOR DRUG EVALUATION AND RESEARCH, MIFEPRISTONE QUESTIONS AND ANSWERS, Sept. 28, 2000, <http://www.fda.gov/cder/drug/infopage/mifepristone/mifepristone-qa.htm>.

²⁴ See *Dutch Officially Approve Floating Abortuary*, LIFESITE (Amsterdam), July 2, 2002; Geraldine Coughlan, *Legal Boost for Dutch Abortion Ship*, BBC NEWS, July 2, 2002; Press Release, Women on Waves Foundation, *Women on Waves Can Sail Again* (July 1, 2002), at http://www.womenonwaves.org/press/e_pressrelease.html; *Dutch Officially Approve Floating Abortion Clinic*, CATHOLIC WORLD NEWS (Amsterdam), July 3, 2002.

²⁵ See Press Release, *Women on Waves Can Sail Again*, *supra* note 24.

²⁶ See *id.*

²⁷ Indeed Dr. Gomperts stated in response to the Ministry of Health’s ruling:

In a news report dated July 2, 2002, Dr. Gomperts stated that Women on Waves planned to set sail within six months²⁸ and it is expected that its destination will again be Ireland.²⁹ Although distribution of the "morning after pill" is permitted in Ireland as a contraceptive, to date RU486 remains unavailable.³⁰ As the Dutch Ministry of Health's ruling only alters the method of abortion, any future visit to Ireland by Women on Waves would apparently involve the same jurisdictional issues and political sensitivities as its original mission.

If the European Court of Justice ("ECJ") were to find abortions in international waters permissible under EC law, all Member States could potentially be affected. Such a finding could create a new "international waters marketplace," aimed at providing services that are otherwise illegal and beyond the jurisdictional reach of nations where these services are unlawful. Considering that all Women on Waves needed to succeed in its 2001 venture was a Dutch abortion license to provide this proposed service on a ship, it is not too great a stretch to imag-

[T]he Appeals Commission is being stricter with Women on Waves [than] the law requires. The contract that Women on Waves signed with a Dutch hospital fulfils the same requirements that apply to all other Dutch abortion clinics. Furthermore the Appeals Commission has not taken into account recent medical developments. According to Women on Waves, first trimester abortions can be provided very safely at sea. A medical expertise report, signed by more than 100 doctors, gynecologists, other experts and two marine doctors and submitted to the commission, has fully endorsed this conclusion. The distance to a hospital is therefore totally irrelevant when providing first trimester abortions. As regards the second reason for denying the license, the Appeals Commission claims that the Health Inspection cannot supervise the activities of Women on Waves since continuous and unannounced inspections would not be possible. This however is not a regulation stipulated by the law. By using this argument the Appeals Commission has failed to apply the law properly. Furthermore, as a seagoing nation, the Dutch government has never had any problems enforcing all kinds of laws on ships registered under its flag. Moreover in the past 20 years there have never been any unannounced inspections of Dutch abortion clinics or other institutes. Nevertheless Women on Waves has offered to establish certain provisions that would make continuous inspections possible. Here too the judgment of the Appeals Commission has been far too strict.

Press Release, Women on Waves Can Sail Again, *supra* note 24.

²⁸ See Andrew Osborn, *Dutch License Floating Abortion Clinic*, THE GUARDIAN (U.K.), July 2, 2002.

²⁹ See Coughlan, *supra* note 24.

³⁰ See Alison O'Connor, *Board Approves Use of Morning After Pill*, THE IRISH TIMES, Nov. 14, 2001.

ine other Member States licensing medical services which raise equally volatile moral issues such as euthanasia, organ donation, the transplantation of fetal tissue, or reproductive medicine.³¹

Because each Member State has its own moral parameters and corresponding laws protecting these interests, conflicts between these laws are inevitable. By provoking such a conflict, Women on Waves raises the broader issue addressed in this comment: what latitude of response is the ECJ going to provide Member States that legitimately and proportionately react to perceived threats to their moral sovereignty?³²

This comment does not argue against liberalization of Irish abortion law, but rather advocates against the tactic Women on Waves is choosing to advance its goals. The fact that the near-future expansion of the EC includes countries that restrict or ban abortion makes this discussion all the more timely. ECJ review of any case arising from the activities of Women on Waves will illustrate a conflict that may be faced by all EC

³¹ I am indebted to Michael Zachary, Adjunct Professor at Pace University School of Law for the euthanasia hypothetical.

³² This comment certainly does not suggest that violations of peremptory norms of international law may be shielded from EC court review merely through the labeling of a Member State's activity as a moral issue. Abortion restriction and/or abortion prohibition have not reached the level of a violation of a preeminent norm.

The October 19, 2002, Irish Referendum on the Treaty of Nice signals that the EU is about to undergo an extensive expansion. See Mark Brennock & Denis Staunton, *Yes Vote Clears Way For 10 States to Join EU*, THE IRISH TIMES, Oct. 21, 2002, at 1; Alan Cowell, *Irish Vote for a Wider Union, and Europe Celebrates*, N.Y. TIMES, Oct. 20, 2002, at A3. If these countries are formally approved, Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Lithuania, Latvia, Estonia, Cyprus and Malta will join the EU in 2004. See Brennock & Staunton, *supra*. Seven of these ten EU applicant countries "have significant Catholic populations and restriction or bans on [sic] abortion such as Poland, Slovakia, Lithuania, Hungary, Slovenia, the Czech Republic and Malta." Marcin Frydrych, *Abortion Not Considered In Enlargement Talks*, EU OBSERVER.COM, Dec. 28, 2001, at http://www.euobserver.com/index.phtml?selected_topic=15&action=view&article_id=4646. Presumably, the "EU applicant countries that wish to maintain anti-abortion measures in their national Constitutions or laws on becoming members of the EU, will need to negotiate special provisions to that effect in their individual Accession Treaties, [similar to Ireland's Protocol No.17 to the Maastricht Treaty]." *Id.* If these countries become Member States, the potential exists for a wide variety of abortion restriction claims to reach the ECJ. The future will have to show whether the probable accession of these states will impact the ECJ's abortion jurisprudence.

Member States that "may be forced to relinquish control of domestic moral issues due to the conveyance of competences, or powers, to a supranational organization."³³

While this is a broad issue with potentially enormous consequences, this comment will confine itself to the issue of whether enjoining Irish nationals from obtaining abortions in international waters would be a permissive derogation from EC law.³⁴ This comment suggests that if Ireland enjoined its nationals from obtaining abortions in international waters, such action, if brought before the ECJ, should be viewed as a permissive derogation from EC law under the public policy exception of Articles 46 and 55 of the EC Treaty. Although the ECJ may inevitably be forced to directly confront the incompatibility between Irish and EC law, the historical, political and religious underpinnings of Irish abortion law dictate that great judicial restraint should be exercised in this regard. This comment concludes that the ECJ should not permit the clever activism of Women on Waves to be the vehicle by which the court confronts and decides a legal issue of such social and political magnitude. Such a finding would be antithetical to the EC's underlying

³³ MacLean, *supra* note 14, at 528.

³⁴ It is acknowledged that with the passage of the Travel Amendment serious questions exist as to whether the Irish Courts would issue a travel injunction in the first instance. See *infra* note 112 and accompanying text for a discussion of the Travel Amendment. This comment will not address the possibility of Ireland obtaining extra-territorial jurisdiction over its nationals once in international waters. Although, it should be noted that presumably Ireland could assert such jurisdiction. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 CMT. 5 (1987) (taking the position that "while states 'generally exercise jurisdiction on the basis of territoriality,' they 'may apply at least some laws to a person outside [state] territory on the basis that he is a citizen'"). [The Restatement] acknowledges, however, that such cases 'have generally involved acts or omissions that also had effect within the state.'" Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, The Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 476 n.82 (1992). Under the prescriptive jurisdiction of nationality, "[a] state has jurisdiction to prescribe rules of law (a) attaching legal consequences to conduct of its nationals wherever the conduct occurs; or (b) relating to a thing, status or other interest of its nationals wherever the thing is located or the status or the other interest is localized." ROSALYN HIGGINS, *The Legal Bases of Jurisdiction*, in EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO 6 (1984) (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965)). Further Ireland could assert extra-territorial jurisdiction under the "Effects Doctrine," the premise of which states that a nation may obtain jurisdiction over extra-territorial acts that have an effect on their nation. See *id.* at 7.

principle of recognizing diverse moral and cultural traditions while fostering common agreement on economic and other issues. The Irish abortion debate is an area of nationalistic moral sovereignty and, as such, liberalization of this law should be left to the Irish people.

II. OVERVIEW OF IRISH ABORTION LAW

A. *Abortion and the Irish Constitution Prior to the 1983 Amendment*

The Irish Constitution (*Bunreacht na hEireann*)³⁵ was adopted in 1937 and was written by Eamon de Valera at “a time when Catholic identity was critical to the Irish State and the Irish people in the wake of their independence from Protestant Great Britain.”³⁶ The Catholic influence was so engrained in this document³⁷ that even before 1983, when there was no express prohibition of abortion in the Constitution, many scholars believed that the Constitution inherently protected the right to life of the unborn.³⁸ This belief was based on “the assumption

³⁵ See Department of the Taoiseach, Translation of Irish Terms at <http://www.taoiseach.gov.ie/general/translations.asp?lang=ENG&loc=283> (last visited Oct. 12, 2002).

³⁶ Amy M. Buckley, *The Primacy of Democracy Over Natural Law in Irish Abortion Law: An Examination of the C Case*, 9 DUKE J. COMP. & INT'L L. 275, 278 (1998). Eamon de Valera (1882 - 1975) “was a leader of Ireland’s struggle for independence from Britain (1916-1921), and of the Republican opposition in the ensuing Irish Civil War, and was subsequently thrice Irish Prime Minister and later President.” WIKIPEDIA, at http://www.wikipedia.org/wiki/Eamon_De_Valera (last visited Dec. 2, 2002).

³⁷ “The Preamble to the Constitution, as well as sections of Articles 40 and 41, exalt God as the ultimate lawgiver and clearly display the moral, social and political teachings of the Catholic tradition” *Id.* See generally *The Constitution of Ireland, 1937*, available at <http://193.178.1.117/upload/publications/297.pdf>.

³⁸ See Buckley, *supra* note 36, at 278-79. See also Liam Hamilton, *Matters of Life and Death*, 65 FORDHAM L. REV. 543, 543-44 (1996) where the Chief Justice of the five-member Supreme Court of Ireland states:

The authors of our 1937 Constitution, which came into effect on 29 December 1937, in including a section on fundamental rights, could have had little idea of the revolutionary impact it would have on Irish society. The then-Taoiseach [Prime Minister] Mr. de Valera seems to have viewed the provisions as being mere ‘headlines for the Legislature’ - standards for government to aim at, but not for courts to enforce. Articles Forty through Forty-four gave express recognition to those rights most prized in Western liberal democracies - personal liberty, freedom of expression, equality before the law, ownership of property, and freedom of religious belief and practice. The social policy of the Catholic Church also made

that under a Constitution written in the Catholic natural law tradition, the right to life of the unborn was a fundamental right, which although not enumerated in the Constitution was nonetheless protected by the document's protection of fundamental, inalienable personal rights."³⁹

Although the specific question of whether the pre-1983 Constitution protected the life of the unborn⁴⁰ was never directly addressed by the Irish courts,⁴¹ in *McGee v. Attorney General*⁴² ("McGee") the Supreme Court, in *dicta*, "indicated that abortion was constitutionally prohibited and that any right to privacy protected by the Constitution did not encompass a general right to an abortion."⁴³ The *McGee* Court did, however, recognize the right to marital privacy as it applies to contraception as an unenumerated personal right under Article 40.3. of the Constitution.⁴⁴ This case, coupled with the passage of England's 1967 Abortion Act, making abortion available to Irish women simply by crossing the Irish Sea to England,⁴⁵ led to fears that *McGee* would be to Ireland what *Griswold v. Connect-*

itself felt, in the form of provisions recognising the Family as 'the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.'

³⁹ Buckley, *supra* note 36, at 279 n.21.

⁴⁰ Article 40.3. of the Irish Constitution, prior to the 1983 Amendment stated: The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. The State shall, in particular, by its laws protect as best as it may from unjust attack and, in the case of injustice done, vindicate the life, [person, good name, and property rights] of every citizen.

KINGSTON, *supra* note 10, at 2.

⁴¹ Abortion was and remains a crime under Section 58 and 59 of the Offences Against the Person Act, 1861. See *supra* note 11 reprinting the text of Section 58.

⁴² [1974] I.R. 284 (Ir. S.C.) [hereinafter *McGee*].

⁴³ KINGSTON, *supra* note 10, at 2.

⁴⁴ See *id.* See *supra* note 40 for the text of Article 40.3. of the Irish Constitution, prior to the 1983 Amendment.

⁴⁵ See Abigail-Mary E.W. Sterling, Note, *The European Union and Abortion Tourism: Liberalizing Ireland's Abortion Law*, 20 B.C. INT'L & COMP. L. REV. 385, 388 (1997). England's 1967 Abortion Act made abortion prior to viability lawful "when two doctors certified that the baby would be born with a serious handicap, or if the pregnancy would pose a greater risk to the health or life of the mother or any of her born children than an abortion would pose." *Id.* at 388 n.20.

icut⁴⁶ was to America,⁴⁷ namely, a precedential foundation for a future abortion rights case akin to *Roe v. Wade*.⁴⁸

Despite clear judicial warnings in *McGee* and subsequent cases⁴⁹ that the right of marital privacy did not affect the right

⁴⁶ 381 U.S. 479 (1965). The U.S. Supreme Court in *Griswold*, invalidated a Connecticut state statute under which a medical director was convicted for giving "information, instruction and medical advice to married persons regarding means of preventing contraception." *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 351-52 (Kermit F. Hall et al. eds., 1992). The Court held that "the statute was invalid because it infringed on the constitutionally protected right to privacy of married persons." *Id.* This seminal case laid the foundation for *Roe v. Wade* in establishing the right to privacy as an unenumerated fundamental right. Judge Hamilton of the Irish Supreme Court has stated:

A majority of the United States Supreme Court, led by Justice Blackmun, held that the right to privacy identified in *Griswold v. Connecticut* extended to "a woman's decision whether or not to terminate her pregnancy." Once the Irish Supreme Court had found a right to marital privacy in *McGee*, it was feared by some commentators that the Court might one day extend this right to cover abortions, in the same manner as *Roe v. Wade*. In truth, this seemed an unlikely prospect; abortion had been a statutory offence since 1861, and both popular and judicial opinion seemed to support this.

Hamilton, *supra* note 38, at 548 (citations omitted).

⁴⁷ See Buckley, *supra* note 36, at 281. See also Paul Ward, *Ireland: Abortion: "X" + "Y" = ?!*, 33 U. OF LOUISVILLE J. OF FAM. L. 385, 389 (1995).

⁴⁸ 410 U.S. 113 (1973). In *Roe v. Wade*, the U.S. Supreme Court held that "the right of privacy [which was acknowledged as a fundamental right in *Griswold*]. . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES*, *supra* note 46 at 3.

⁴⁹ Walsh J. in *McGee* stated, "any action on the part of either the husband and the wife or of the State to limit the family sizes by endangering or destroying human life must necessarily not only be an offense against the common good but also against the guaranteed personal rights of the human life in question." [1974] I.R. 284, 312 (Ir. S.C.). Walsh J. expressed similar sentiments in *G. v. An Bord Uchtala*, in which he stated:

Not only has the child born out of lawful wedlock the natural right to have its welfare and health guarded no less well than that of a child born in lawful wedlock, but *a fortiori* it has the right to life itself and the right to be guarded against all threats directed towards its existence whether before or after birth. The child's natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to practice of religion, and to follow his or her conscience. The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation. It lies not in the power of the parent who has the primary natural rights and duties in respect of the child to exercise them in such a way as intentionally or by neglect to endanger the health or life of the child or to terminate its exis-

of the unborn, the anti-abortion movement launched a campaign for a constitutional amendment to guarantee the right to life of the unborn.⁵⁰ In September of 1983, the Irish people voted in favor of a constitutional amendment clearly intended "to prevent abortion ever occurring in Ireland."⁵¹ The vote creating the Eighth Amendment was carried and is now Article 40.3.3., which reads: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."⁵² The passage of the Eighth Amendment set the course for a future "collision between Irish moral sovereignty and the [EC]."⁵³

B. *Abortion and the Right to Travel Prior to the 1992 Travel Amendment*

Since the Irish Parliament did not pass abortion legislation after the 1983 Amendment, it was left to the courts to interpret Article 40.3.3. and to attempt to "vindicate [the right to life of the unborn] and, where necessary, to reconcile its right to life with that of the mother."⁵⁴ The first two cases brought before the Irish courts after the 1983 Amendment concerned abortion information and only tangentially touched upon a woman's right to travel abroad for an abortion. Before and after the 1983 Amendment, "it was widely known that pregnant women with unwanted pregnancies went to England for abortions" and information pertaining to abortion services abroad was available from a variety of sources.⁵⁵

tence. The child's natural right to life and all that flows from that right are independent of any right of the parent as such.

[1980] I.R. 32, 69 (Ir. S.C.).

⁵⁰ See KINGSTON, *supra* note 10, at 4. See also Ward, *supra* note 47, at 390.

⁵¹ Ward, *supra* note 47, at 390. "The total possible electorate was 2,358,651 and of these 1,265,994 voted—481,223 in favour and 416,136 against." *Id.* at 390 n.44.

⁵² Art. 40.3.3., Constitution of Ireland, 1937, available at <http://193.178.1.117/upload/publications/297.pdf>.

⁵³ MacLean, *supra* note 14, at 552-53.

⁵⁴ Carol Coulter, *1983 Amendment Left to Courts*, THE IRISH TIMES, Oct. 3, 2001, at 7.

⁵⁵ Ward, *supra* note 47, at 390.

1. *First Information Case: SPUC v. Open Door*

The first case challenging the Eighth Amendment was brought by an Irish anti-abortion organization that sought to enjoin two organizations from providing non-directive abortion counseling and referrals to abortion providers overseas. In *Attorney General ex rel. The Soc'y for the Prot. of Unborn Children Ireland Ltd. ("SPUC") v. Open Door Counselling Ltd. and Dublin Well Woman Ctr.*,⁵⁶ SPUC argued that abortion counseling was prohibited under Article 40.3.3.. The High Court agreed, ruling that "counseling and assisting of pregnant women to travel abroad to obtain an abortion was illegal under Article 40.3.3. . . . [and] that the defendant's activities amounted to a restrainable activity."⁵⁷ The ruling was upheld by the Supreme Court, which found that "giving information about abortion assisted in the ultimate destruction of human life."⁵⁸ The court further held "the right to life is absolute and trumps the right to freedom of expression because there is no implied or unenumerated right to information that could destroy the expressly guaranteed right to life of the unborn."⁵⁹ The Supreme Court rejected the defendant's claim "that the case implicated questions of [EC] law and refused to refer the case to the ECJ."⁶⁰

The Open Door clinic appealed the case to the European Commission of Human Rights, arguing, *inter alia*, that the injunction violated Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, "which advocates freedom of information."⁶¹ The Commission

⁵⁶ [1988] I.R. 593 (Ir. H. Ct.) [hereinafter *Open Door*].

⁵⁷ MacLean, *supra* note 14, at 553. *See also* *Open Door*, [1988] I.R. 593 at 617 (Ir. H. Ct.).

⁵⁸ Sterling, *supra* note 45, at 389. *See also* *Open Door*, [1988] I.R. 618, 624 (Ir. S.C.).

⁵⁹ Sterling, *supra* note 45, at 389. *See also* *Open Door*, [1988] I.R. 618 at 625 (Ir. S.C.).

⁶⁰ Sterling, *supra* note 45, at 389. Chief Justice Finlay found, "[s]ince no claim is made on behalf of the defendants that [assistance to a pregnant woman to travel abroad and obtain the service of abortion] is a corollary right to whatever rights such woman may have under the Treaty [of Rome], it follows that no question of the interpretation of the Treaty fails to be decided in this case." *Id.* at 289 n.30 (citing [1988] I.R. 618 at 626).

⁶¹ *Id.* at 390. Article 10 (Freedom of Expression) of the European Convention on Human Rights provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and

ruled in favor of the clinics and held in its report that the injunction breached the freedom of expression of Article 10.⁶² The

ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, *for the protection of health or morals, for the protection of the reputation or rights of others*, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Nov. 4, 1950, art. 10, 213 U.N.T.S. 222, 230 [hereinafter CONVENTION ON HUMAN RIGHTS] (emphasis added). In addition to asserting that the injunctions violated Article 10 of the Convention on Human Rights, the clinic also argued that the injunctions violated Article 8 (the right to privacy) and Article 14 (the right to Equal Protection of the laws). Ultimately, the Commission decided the case on the Article 10 claim.

Article 8 provides:

1. Everyone has the right to respect for his *private and family life*, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary for in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, *for the protection of health or morals*, or for the protection of the rights and freedoms of others.

Id. art. 8, at 230 (emphasis added).

Article 14 provides:

The enjoyment of rights of freedoms set forth in this Convention shall be secured without discrimination on any such ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or status.

Id. art. 14, at 232 (emphasis added).

⁶² The European Convention on Human Rights and Fundamental Freedoms was signed by Member States of the Council of Europe in 1950, and established two bodies, the European Commission of Human Rights and the European Court of Human Rights (ECHR). See G. Diane Lee, Comment, *Ireland's Constitutional Protection of The Unborn: Is it in Danger?* 7 TULSA J. COMP. & INT'L L. 413, 423 (2000) (citing Inter-Departmental Working Group on Abortion, Gov't of Ir., GREEN PAPER ON ABORTION (Sept. 1999) 22, available at <http://193.178.1.117/upload/publications/251.pdf>). "These two bodies have recently been replaced by a new ECHR, and decisions of the new court will also be legally binding on the parties." *Id.* at 423 n.78. Under the old regime, "a citizen of a Member State [could] bring a complaint to the European Commission of Human Rights, a mediating body, for determining whether there has been a violation of the European Convention of Human Rights." *Id.* at 423 (citing Gerry Whyte, *Abortion and the Law*, 42 DOCTRINE AND LIFE 253, 261 (1992)). A Commission decision could further be "referred to the European Court of Human Rights within three months for an authoritative deci-

Commission determined that Open Door's activities were not expressly prevented by the terms of Article 40.3.3. because the Amendment was "insufficiently precise" to give notice to the clinics that their activities were unlawful.⁶³ Further, the Commission found that the injunction "went beyond what was necessary in a democratic society."⁶⁴

However, the Commission's analysis was rejected by the European Court of Human Rights ("ECHR"),⁶⁵ which found that "the injunction served the Irish government's legitimate aim of protecting the rights of the unborn which are guaranteed in Ireland's Constitution."⁶⁶ Although the ECHR acknowledged that "national authorities enjoy a wide margin of appreciation in matters of morals" and that "State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them,"⁶⁷ it nevertheless found a breach of Article 10. The ECHR found the injunction disproportionate to Ireland's legitimate aim of protecting the unborn.⁶⁸ This ruling was based, in

sion on whether a violation has occurred." *Id.* (citing Whyte, at 255 n.4). The ECHR can award compensation, and although its judgments are not binding on Irish courts, "the government is, however, supposed to remedy any legislation that violates the European Convention on Human Rights." *Id.* at 423 n.83 (citing PAUL O'HIGGINS, *INTERNATIONAL SOCIAL POLICY: ITS IMPACT ON IRISH LEGAL PRACTICE, IN LAW & SOCIAL POLICY, SOME CURRENT PROBLEMS IN IRISH LAW* 15 (William Duncan ed., 1987)). See *Open Door Counselling v. Ireland*, App. No. 14234/88 & 14235/88, 14 Eur. H.R. Rep. 115 (1991) (Commission report) [hereinafter *Open Door Eur. Comm. HR*].

⁶³ See *Open Door Eur. Comm. HR*, 14 Eur. H.R. Rep. at 137.

⁶⁴ Lee, *supra* note 61, at 423 (citing Whyte, at 255). See also *Open Door Eur. Comm. HR*, 14 Eur. H.R. Rep. at 141-44 (Schermers, H.G., concurring). It is noteworthy that "other Eur. Comm'n H.R. members found this analysis weak and although he concurred with the majority, Mr. Schermers' opinion clearly supports the right of a Member State to protect the unborn." Lee, *supra* note 61, at 423.

⁶⁵ See *Open Door Counselling v. Ireland*, 246 Eur. Ct. H.R. (ser. A) (1992) [hereinafter *Open Door ECHR*].

⁶⁶ Lee, *supra* note 61, at 424. Specifically, the Court stated, "it is evident that the protection afforded under Irish law to the right to life of the unborn is based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum. The restriction thus pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect." *Open Door ECHR*, 246 Eur. Ct. H.R. at 27 (internal citation omitted).

⁶⁷ *Open Door ECHR*, 246 Eur. Ct. H.R. at 29.

⁶⁸ See *id.* at 32.

part, on the Court's observation of the "absolute" and "perpetual" nature of the injunction coupled with the reality of large numbers of women traveling to England who were "already receiving information on abortion services outside Ireland."⁶⁹

This case appears to hold that the Convention "allows a [M]ember [S]tate to legislate an abortion ban when deemed necessary to protect morals, and it allows information and travel for abortion purposes to be banned provided the ban is applied proportionately."⁷⁰

2. *Second Information Case: SPUC v. Grogan*

While *SPUC v. Open Door* was pending at the European Court of Human Rights, SPUC brought another case before the Irish courts seeking to enjoin three student unions from distributing student handbooks containing information on abortion clinics in the United Kingdom. In *Soc'y for the Prot. of Unborn Children (Ireland) Ltd. v. Grogan* ("Grogan"),⁷¹ the student unions were accused of violating Article 40.3.3..⁷² The defendants asserted that they had a "legal-economic right to information about services available in other Member States under [Articles 59 and 60, currently Articles 49 and 50] of the Treaty of Rome [and] that there is a right to disseminate such information

⁶⁹ Lee, *supra* note 61, at 424. See also *Open Door* ECHR, 246 Eur. Ct. H.R. at 30. The ECHR stated:

It has not been seriously contested by the Government that information concerning abortion facilities abroad can be obtained from other sources in Ireland such as magazines and telephone directories or by persons with contacts in Great Britain. Accordingly, information that the injunction sought to restrict was already available elsewhere although in a manner which was not supervised by qualified personnel and thus less protective of women's health. Furthermore, the injunction appears to have been largely ineffective in protecting the right to life of the unborn since it did not prevent large numbers of Irish women from continuing to obtain abortions in Great Britain.

Id. at 31 (internal citation omitted).

⁷⁰ Lee, *supra* note 61, at 424-25.

⁷¹ [1989] I.R. 753 (Ir. H. Ct.) [hereinafter *Grogan*].

⁷² See MacLean, *supra* note 14, at 554. "The absence of state action is not a problem in Irish constitutional law: 'If one citizen has a right under the Constitution there exists a correlative duty on the part of the other citizens to respect that right and not interfere with it.'" DIARMUID ROSSA PHELAN, *REVOLT OR REVOLUTION THE CONSTITUTIONAL BOUNDARIES OF THE EUROPEAN COMMUNITY* 375 n.20 (1997) (quoting *Educ. Co. of Ireland v. Fitzpatrick* [1960] I.R. 368 (Budd J., Ir. H.Ct)).

under [the European Union]”⁷³ The High Court agreed with the defendants’ argument that the right to travel to avail oneself of services in other Member States must include the right to receive information about these services.⁷⁴ The court, however, referred to the ECJ⁷⁵ the question of whether the right to receive information gave rise to the right to distribute information under EC law.⁷⁶ The ECJ held that although abor-

⁷³ Sterling, *supra* note 45, at 390. The Treaty of Amsterdam adopted numbering changes to the EC Treaty and the Maastricht Treaty [Treaty on European Union]. This comment uses the numbering adopted by the Treaty of Amsterdam. For an explanation of these numbering changes, see *The Amsterdam Treaty: a Comprehensive Guide*, EUROPA, at <http://europa.eu.int/scadplus/printversion/en/lvb/a10000.htm> (last visited Oct. 14, 2002).

⁷⁴ See Grogan, [1989] I.R. 753 at 758.

⁷⁵ The European Court of Justice is the “supreme court of EU law.” Lee, *supra* note 61, at 425. “The EU (formerly the European Community) includes the Member States of Austria, Sweden, Finland, France, Germany, United Kingdom (Great Britain and Northern Ireland), Italy, Belgium, Netherlands, Luxembourg, Denmark, Spain, Portugal, Greece, and the Republic of Ireland.” *Id.* at 425 n.103. For a list of current EU Member States, see The Member States of the European Union at http://europa.eu.int/abc/eu_members/index_en.htm (last visited Oct. 12, 2002). See also *supra* note 32 for a discussion of the Irish Referendum on the Treaty of Nice and likely expansion of the EC.

⁷⁶ See MacLean, *supra* note 14, at 553-54. The High Court has the authority to refer questions to the ECJ that may involve interpretive issues of EC law under Article 234 of the EC Treaty. See *id.* at 554. Article 234 provides:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning

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

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 173, art. 234 (1997) (as amended by the TREATY OF AMSTERDAM) [hereinafter EC TREATY]. The High Court, referred the following three questions under Article 234:

1. Does the organized activity or process of carrying out an abortion or the medical termination of pregnancy come within the definition of “services” provided for in Article 60 [currently Article 50] of the Treaty [E]stablishing the European Economic Community?
2. In the absence of any measures providing for the approximation of the laws of Member States concerning the organized 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

tion was considered a "service" under Article 59 [currently Article 49],⁷⁷ the EC Treaty did not cover the students' activities because the student organizations had "no affiliation with the providers of the abortion services."⁷⁸ By limiting its ruling to what amounts to an economic nexus analysis, the ECJ evaded answering the substantive and politically charged questions presented to them.⁷⁹

Declaring abortion a service under Article 60 [currently Article 50] established that laws regulating access to abortion are not governed exclusively by Irish law, but may be subject to EC law if the appropriate economic ties are established. This case appears to hold that an information provider who can show an economic nexus between itself and an abortion provider would be covered under EC law.⁸⁰

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?

Case C—159/90, *Society for the Protection of Unborn Children v. Grogan*, 1991 E.C.R. I-4733, 4736-37, [1991] 3 C.M.L.R. 849, 856 (1990) [hereinafter *Grogan ECJ*].

⁷⁷ See *Grogan ECJ*, 1991 E.C.R. at I-4739, 3 C.M.L.R. at 850. Article 59 [currently Article 49] of the EC Treaty provides as follows:

Within 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 this Chapter to nationals of a third country who provide services and who are established within the Community.

EC TREATY art. 59 [currently article 49].

⁷⁸ Buckley, *supra* note 36, at 284. See *Grogan ECJ*, 1991 E.C.R. at I-4739, 3 C.M.L.R. at 850.

⁷⁹ See Buckley, *supra* note 36, at 285-86. See *supra* note 76, listing the three questions certified to the ECJ from the High Court. See generally MacLean, *supra* note 14 for an excellent discussion of the ECJ's avoidance of substantive issues concerning Ireland and abortion. MacLean characterizes the ECJ, in *Grogan*, as dodging the first direct conflict between EC law and Irish abortion law. See *id.* at 554. See also KINGSTON, *supra* note 10, at 37-51; Stoffregen, *supra* note 11, at 557.

⁸⁰ Although the ECJ failed to rule in the students' favor, the Court rejected Ireland's argument that the injunction was permitted as a public policy exception under Article 56 [currently Article 46], which reads in pertinent part, "The provi-

3. *Protocol No. 17 to the Maastricht Treaty*

After *Grogan*, but prior to the *X Case* (discussed below), Ireland was in a political dilemma. By declaring abortion an economic service, the ECJ laid the foundation for “ECJ case law [being used] to override Article 40.3.3., where the economic ties referred to in *Grogan* were present”⁸¹ Ireland found its opportunity to counter this possibility in December of 1991, when the EC Member States replaced the Treaty of Rome with the Maastricht Treaty.⁸² “[T]he government of Ireland sought a provision to the Maastricht Treaty that would preclude EU law [from] overturning Ireland’s constitutional protection of the unborn.”⁸³ Ireland insisted on annexing Protocol No.17 to the Maastricht Treaty, which provides as follows:

sions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.” EC TREATY art. 56 [currently art. 46]. Thus the ECJ’s ruling demonstrates that the public policy exception in Article 56 [currently Article 46] will not be broadly construed. The ECJ’s decision in *Grogan* has been described as “the low water mark of the Court’s regard for national constitutional law.” PHELAN, *supra* note 72, at 379.

Grogan established the possibility of using Article 59 [currently Article 49] (EC) as a sword against a constitutional right Despite ruling the moral issue to be irrelevant, the [ECJ] in . . . *Grogan* adopted an approach with enormous moral implications by recharacterisation of the rights in issue, based on economic principle which denies the validity of the Irish constitutional position in the European Community. By defining abortion as an economic activity in European Community law the Court has placed abortion under the Article 2 (EC) task to promote throughout the Community a harmonious and balanced development of economic activities.

Id. at 381. This criticism is based on a historical survey of the ECJ’s evolving jurisprudence and interpretation of fundamental rights. *See generally id.* at 371-400.

⁸¹ MacLean, *supra* note 14, at 559.

⁸² TREATY ON EUROPEAN UNION, 1997 O.J. (C 340) 145 (as amended by the TREATY OF AMSTERDAM) [hereinafter MAASTRICHT TREATY].

⁸³ Lee, *supra* note 61, at 427. “Protocol No. 17 to the Treaty on European Union was adopted to avoid the possibility of Community law overriding Article 40.3.30 of the Constitution should a conflict arise between this constitutional provision and Community law.” Inter-Departmental Working Group on Abortion, Gov’t of Ir., GREEN PAPER ON ABORTION (Sept. 1999) 25 [hereinafter GREEN PAPER] (The GREEN PAPER is an official government report on abortion in Ireland. The text was decided by an Irish Cabinet Committee (established by the Government of Ireland) and the preparatory work was carried out by an Interdepartmental Working Group), available at <http://193.178.1.117/upload/publications/251.pdf>. “This Protocol created in essence a form of automatic derogation whereby European Community law would not apply to Irish abortion issues, for by its instructions the

The High Contracting Parties have agreed upon the following provision, which shall be annexed to the Treaty on European Union and to the Treaties establishing the European Communities: Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3. of the Constitution of Ireland.⁸⁴

Protocol No. 17 "directs the European Court of Justice to defer to Irish law in so far as there may be a conflict between Community law and the application in Ireland of Article 40.3.3. of the Constitution."⁸⁵ The Maastricht Treaty was signed on February 7, 1992, but not yet ratified, when Ireland was confronted with what has been described as "one of the most important constitutional cases to come before an Irish court and . . . one of the most widely debated and analysed cases in Irish legal history."⁸⁶

4. *The X Case*

The first case requiring Irish courts to directly consider the conflict between the right to life of the mother against that of the fetus pursuant to Article 40.3.3.⁸⁷ was *Attorney General v. X*

ECJ could no longer supersede Irish law on matters relating to abortion." Anne M. Hilbert, Note, *The Irish Abortion Debate: Substantive Rights and Affecting Commerce Jurisprudential Models*, 26 VAND. J. TRANSNAT'L L. 1117, 1151 (1994).

⁸⁴ PROTOCOL ANNEXED TO THE TREATY ON EUROPEAN UNION AND TO TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES [Regarding Ireland], Feb. 7, 1992, 31 I.L.M. 247 at 362 [hereinafter MAASTRICHT TREATY Protocol 17] (emphasis added). "The issue of travel had not yet risen directly in litigation at the time of the adoption of the Protocol, other than in relation to assistance in making travel arrangements in [SPUC v. Open Door]" KINGSTON, *supra* note 10, at 163.

⁸⁵ KINGSTON, *supra* note 10, at 164-65. It has been stated that an additional intent of the Protocol was to assure the political backing of the anti-abortion groups for the Maastricht Treaty referendum. See MacLean, *supra* note 14, at 559.

⁸⁶ KINGSTON, *supra* note 10, at 6.

⁸⁷ The issue of lawfulness in this context was addressed in *dicta* in *Attorney General (S.P.U.C.) v. Open Door Counselling Ltd.*, [1988] I.L. 593 (Ir. H. Ct.), where Hamilton P. stated:

that the right to the life of the unborn was a natural law right recognised and protected by the Constitution prior to the Eighth Amendment. However, he stated later in that case that he was not looking at the issue of how the right to life of the unborn might be regarded in view of the equal right to life of the pregnant woman.

KINGSTON, *supra* note 10, at 6 (citing [1988] I.L. 593 at 597, 617).

and Others ("X Case").⁸⁸ This case took place in February of 1992, when the High Court granted the Attorney General's request for an injunction prohibiting a fourteen-year old rape victim (who was subsequently declared by the court to be suicidal because of the rape and resulting pregnancy) from having an abortion or from traveling to England for an abortion.

Presumably, such injunctions were not regularly sought as common sense dictates that pregnant women traveling to England for abortions would not ordinarily bring their intentions to the attention of legal authorities. However, in the *X Case*, the victim's parents contacted the Irish police⁸⁹ inquiring about proper collection of DNA evidence for the prosecution of the alleged rapist. The Director of Public Prosecutions was consulted and the case was referred to the Attorney General who then petitioned for the injunction.⁹⁰ The High Court granted the injunction, directly balancing the rights of the unborn against that of the mother: "[T]he risk that the defendant may take her own life if an order is made is much less and is of a different order of magnitude than the certainty that the life of the unborn will be terminated if the order is not made."⁹¹ However, the High Court's decision was reversed by the Supreme Court which held that "[I]f it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such a termination is permissi-

⁸⁸ [1992] 1 I.R. 1(Ir. H. Ct.) [hereinafter *X Case*].

⁸⁹ An Garda Síochána.

⁹⁰ The Inter-Departmental Working Group on Abortion, Gov't of Ireland stated:

Both the girl and her parents wished to travel abroad so that she could have an abortion. The issue of having scientific tests carried out on retrieved foetal tissue so as to determine paternity was raised with An Garda Síochána. The Director of Public Prosecutions was consulted and in turn informed the Attorney General. An injunction was obtained *ad interim* to restrain the girl from leaving the jurisdiction or from arranging or carrying out a termination of the pregnancy.

GREEN PAPER, *supra* note 83, at 16. For criticism of the High Court decision and discussion of the legal effect of interim orders upon defendants outside the jurisdiction, see Ward, *supra* note 47, at 403.

⁹¹ *X Case*, [1992] 1 I.R. at 12 (Ir. H. Ct.). See also MacLean, *supra* note 14, at 558.

ble, having regard to the true interpretation of Article 40[.3.3.] of the Constitution.”⁹²

Thus, the major difference in the reasoning between the High Court and the Supreme Court was the latter court’s “classification of suicide as a qualifying medical risk to the life of the mother under the Eighth Amendment.”⁹³ Because X had established to the court’s satisfaction that she was suicidal, under the forgoing rationale, she was permitted to have an abortion. It is worth noting that the issue in this case was whether X could obtain an abortion *in Ireland*, not whether she had a right to travel to obtain one.⁹⁴ In *dicta*, however, three of the five Supreme Court Justices made the controversial suggestion that “the right to travel could be restricted in favor of the right to life of the unborn.”⁹⁵

Chief Justice Finlay, Justice Egan, and Justice Hederman (who alone dissented on the substantive issue) were of [the] opinion that the right to travel was not absolute, and could not simpliciter take precedence over the right to life: This meant that injunctions restraining travel abroad to procure abortions could be justified.⁹⁶

Justice O’Flaherty and Justice McCarthy did not agree with such restrictions on travel.

The former thought it would interfere to an unwarranted degree with the individual’s freedom of movement and with family authority; the latter felt that the court had no jurisdiction to curtail the right to travel on the basis of an intention, even if that intention were to commit a crime in another jurisdiction.⁹⁷

What is striking about both the High Court and the Supreme Court decisions in the *X Case* is the near total silence regarding the implication of EC law.⁹⁸ Both Irish courts appar-

⁹² X Case, [1992] 1 I.R. at 53-54 (Ir. S.C.).

⁹³ Buckley, *supra* note 36, at 286.

⁹⁴ See *id.* at 288. Although the distinct scope of the X case is legally significant, in practical terms it is arguably irrelevant. The obvious lack of skilled abortion practitioners in Ireland would seem to require women who met the X case “suicide standard” to travel to England for the abortion procedure.

⁹⁵ *Id.*

⁹⁶ Hamilton, *supra* note 38, at 555-56.

⁹⁷ *Id.* at 556.

⁹⁸ See MacLean, *supra* note 14, at 558. “The Supreme Court in X grounded its reasoning exclusively in Irish constitutional law, placing no reliance upon European Community legal principles.” Hilbert, *supra* note 83, at 1143. The High

ently felt that their handling of the case was "sufficient to dispose of . . . what [was] considered . . . 'the substantive issue' in the case."⁹⁹

As stated above, the *X Case* focused on the right to legal abortion in Ireland, and did not directly address the right to travel to obtain an abortion. But even so, the logical implication of this case is that a woman did not have a right to travel to have an abortion in the absence of a real and substantial risk to her life.¹⁰⁰ While the merits of the travel implication established in the *X Case* are not considered in this comment, it should be noted that the widely publicized fact that "an estimated 100 Irish women travel to England each week for abortions,"¹⁰¹ surely would suggest that such a standard would be judicially unmanageable.

5. *The Solemn Declaration*

As noted earlier, the *X Case* was decided before the Maastricht Treaty (containing Protocol 17) was put before the Irish people for ratification. "Because of the [Irish] public's sentiment . . . [after the *X Case*], ratification of the Maastricht Treaty which required a Constitutional Amendment, and thus the vote of the people, was jeopardized."¹⁰²

Court, however, did acknowledge the "fundamental right to travel to procure services for all EEC citizens . . . [but noted] that there is also a public policy derogation that could be invoked by a Member State to prohibit such travel." Rachel A. Yorke, *Tiocfadh Ar La: Ireland's Struggle With Abortion*, 5 NEW. ENG. INT'L & COMP. L. ANN. 83, 94 (1999). Some commentators believe that the *X Case* could have easily been referred to the ECJ under Articles 49 and 50, and the ECJ could have found Ireland's law contrary or inconsistent with these Articles. *See id.*

⁹⁹ Hamilton, *supra* note 38, at 555. *See also* MacLean, *supra* note 14, at 558. By basing its decision exclusively in Irish law, the Irish courts were not obligated to petition the ECJ with questions regarding the impact of EC law in the case. If such advice was sought from the ECJ, final resolution of the case might have been delayed by as much as eighteen months. *See* Gerry Whyte, *Abortion and the Law*, 42 DOCTRINE AND LIFE 253, 257 n.8 (1992).

¹⁰⁰ *See* Buckley, *supra* note 36, at 288.

¹⁰¹ Denis Fitzgerald, *Voters' Heavy Burden* 49 WORLD PRESS REVIEW 4 (Spring 2002), <http://www.worldpress.org/europe/0402eire.htm>. *See also* Irish Family Planning Association, *Irish Abortion Statistics* at <http://www.ifpa.ie/campaigns/abortion/iabst.html> (last visited Dec. 3, 2002) ("Between January 1980 and December 1999, at least 85,559 Irish women had abortions in Britain.").

¹⁰² Lee, *supra* note 61, at 427. The *X Case* ruling "caused world-wide outrage and protests. Demonstrators took to the streets of Dublin with signs that read 'Rapists 1- Women 0,' 'Human Rights for Rape Victims,' and 'Ireland Defends

The result of the *X Case* was disturbing to both the anti-abortion and pro-choice groups and both launched campaigns against ratification of the Maastricht Treaty.¹⁰³ Fearing the Irish people would not ratify the treaty and after the Prime Minister's unsuccessful attempt to amend Protocol 17,¹⁰⁴ "Ireland's only resort was to sign a Solemn Declaration"¹⁰⁵ to the Maastricht Treaty:

The High Contracting Parties to the Treaty on European Union signed at Maastricht on the seventh day of February 1992, Having considered the terms of Protocol No 17 to the said Treaty on European Union which is annexed to that Treaty and to the Treaties establishing the European Communities, Hereby give the following legal interpretation:
That *it was and is their intention* that the Protocol shall not limit freedom to travel between Member States or, in accordance with conditions which may be laid down, in conformity with Community law, by Irish legislation, to obtain or make available *in Ire-*

Men's Right to Procreate by Rape.' A poll taken showed two-to-one support for modifying the Eighth Amendment to allow abortion under some circumstances." Yorke, *supra* note 97, at 94 (citing Stoffregen, *supra* note 11, at 543 and Natalie Klashtorny, *Ireland's Abortion Law: An Abuse of International Law*, 10 TEMP. INT'L & COMP. L.J. 419, 428 (1996)). See *supra* text accompanying note 85 for a detailed discussion of the *X Case*.

¹⁰³ See MacLean, *supra* note 14, at 559. After the *X Case*, anti-abortion groups were concerned about the latitude given to the right to the mother's life (*i.e.*, that suicide was a valid threat to the life of the mother). See Whyte, *supra* note 98, at 257-58. Additionally, the anti-abortion movement was concerned that allowing abortion within Ireland "contravened the will of the people as expressed in the 1983 referendum." JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 437 (3d ed. 2000). Casey remarks that this later concern is hard to reconcile as "in 1983 the people had voted for a text clearly recognising the potential for conflict between the rights to life of the mother and the foetus . . ." *Id.* at 437 n.109. On the other hand, the pro-choice movement was concerned that ratification of the Protocol would interfere with the freedom to travel abroad for an abortion where no threat to the mother's life was present. See Whyte, *supra* note 98, at 257-58.

¹⁰⁴ On April 6, 1992, Prime Minister Reynolds

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

Jeffrey A. Weinstein "An Irish Solution To An Irish Problem": *Ireland's Struggle With Abortion Law*, 10 ARIZ. J. INT'L & COMP. L. 165, 195 (1993).

¹⁰⁵ MacLean, *supra* note 14, at 560.

land information relating to services lawfully available in Member States.¹⁰⁶

At the same time the High Contracting Parties solemnly declare that, in the *event of a future constitutional amendment in Ireland* which concerns the subject matter of Article 40.3.3. of the Constitution of Ireland and which does not conflict with the intention of the High Contracting Parties hereinbefore expressed, they will, following the entry into force of the Treaty on European Union, be favourably disposed to amending the said Protocol so as to extend its application to such constitutional amendment if Ireland so requests.¹⁰⁷

Although questions remain as to the legal effect of the Declaration,¹⁰⁸ "it was enough, along with the economic benefits¹⁰⁹ and a promise of an abortion referendum,¹¹⁰ to secure ratifica-

¹⁰⁶ It appears that this language may have been inserted to address the Irish public's outrage after the X Case. See *supra* note 102, discussing the post-X Case reaction. That the Declaration states, "it was and is the intention" is perplexing in light of the clear contrary intention of Protocol 17. See HOGAN & WHELAN, *IRELAND AND THE EUROPEAN UNION CONSTITUTIONAL AND STATUTORY TEXTS AND COMMENTARY* 148-51 (1995) for a discussion of the legal effect of the seemingly contradictory intentions of the Declaration and the Protocol.

¹⁰⁷ DECLARATION OF THE HIGH CONTRACTING PARTIES TO THE TREATY ON EUROPEAN UNION, 1992 O.J. (C 191) 109. This section could have arguably been added as a concession to the anti-abortion movement, which anticipated a future constitutional amendment further restricting abortion. Indeed, such an amendment was proposed in 2001. See *infra* note 177 for a discussion of the Protection of Human Life in Pregnancy Bill 2001.

¹⁰⁸ See KINGSTON, *supra* note 10, at 170-76 for an in-depth discussion of the legality of the Declaration. "The Solemn Declaration did not appear to be legally binding on the ECJ, nor to serve as anything more than an interpretive guide for the courts. It did not convince anyone that the Protocol was not intended to derogate from the free circulation and freedom to provide services." Sterling, *supra* note 45, at 396. "The prevailing view is that the Declaration is not legally binding. In all likelihood, the Declaration is nothing more than a statement of political intent." Buckley, *supra* note 36, at 290. See also HOGAN & WHELAN, *supra* note 106, at 143-54.

¹⁰⁹ "Since its membership began in 1973 Ireland increased its level of prosperity due to increased trade and Community subsidies to the poorer countries. The government projected that the union would bring Ireland approximately \$10 billion over the next five years." Weinstein, *supra* note 104, at 195.

¹¹⁰ After Prime Minister Reynolds returned home from his unsuccessful attempt to change Protocol 17, he "announced that a referendum would be held later in the year. He stated that a further amendment to the Constitution was the most likely way of protecting the right of Irish women to travel to other European Community states and to be given information on abortion services outside of Ireland." Weinstein, *supra* note 104, at 195.

tion of the [Maastricht Treaty] by the Irish people on June 18, 1992.”¹¹¹

C. *The 1992 Travel Amendment to the Irish Constitution*

Responding to the *X Case* and fearing that the ECJ would rule against Irish law, the Irish people passed two constitutional amendments which by all appearances guaranteed a woman's right to abortion information and her corresponding right to travel abroad to get an abortion.¹¹² The Fourteenth Amendment to the Irish Constitution reaffirms the right to freedom of information: “This subsection [Article 40.3.3.] shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.”¹¹³ What is now the Thirteenth Amendment of the Irish Constitution protects the right to travel: “*This subsection* [Article 40.3.3.] shall not limit freedom to travel between the State and another state.”¹¹⁴ Some had thought that the Travel Amendment had

¹¹¹ MacLean, *supra* note 14, at 560. “The Maastricht Treaty was approved [in June of 1992] by 69 percent of Irish voters.” Weinstein, *supra* note 104, at 195.

¹¹² “Following the vote, Irish politicians promised to introduce legislation concerning permissible abortions in circumstances such as rape, incest, and the risk of suicide.” Buckley, *supra* note 36, at 290. To date no such legislation has been passed. See WORKERS SOLIDARITY MOVEMENT, *Abortion Referendum Victory in Ireland*, Mar. 8, 2002, available at <http://flag.blackened.net/revolt/wsm/news/2002/refvictoryMARCH.html>.

¹¹³ Art. 40.3.3., Constitution of Ireland, 1937, available at <http://193.178.1.117/upload/publications/297.pdf>.

Subsequent to the passage of the Fourteenth Amendment,

[l]egislation was introduced in the form of the Regulation of Information (Services outside the State for Termination of Pregnancies) Act, 1995 which laid down in law, as contemplated by the recent ‘information’ amendment of the Constitution, conditions under which information relating to services lawfully available in another State might be made available within the State. This Act permits a doctor or advice agency to provide abortion information to pregnant women in the context of full counselling as to all available options and without any advocacy of abortion. Abortion referral is specifically prohibited under the Act. This legislation was referred to the Supreme Court by the President and its constitutionality was upheld.

GREEN PAPER, *supra* note 83, at 19. See also *infra* note 130 for a summary of the pertinent sections of this Act. See, Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, 1995, available at <http://www.ifpa.ie/download/InfoAct.pdf>.

¹¹⁴ Art. 40.3.3., Constitution of Ireland, 1937, available at <http://193.178.1.117/upload/publications/297.pdf> (emphasis added).

"provid[ed] that the right to life of the unborn could not be invoked to prevent anyone exercising their freedom to travel" ¹¹⁵

It was generally believed that with the passage of the Travel Amendment, Ireland "fell in line with ECJ proclamations" and thus successfully averted a future clash with EC law.¹¹⁶ Indeed a plain reading of the Amendment would appear to support the conclusion that the Irish courts lost their power to enjoin women from traveling abroad to have an abortion. On the other hand, the wording of the statute, in particular the limiting phrase of "this subsection [Article 40.3.3.]," could be interpreted to mean that "rights arising from constitutional provisions other than [A]rticle 40.3.3. might be invoked to restrain a non-suicidal pregnant woman from travelling outside the State to have an abortion."¹¹⁷ It appears that the Irish courts have not entirely lost their power to enjoin travel as it relates to abortion. As the 1997 *C Case* illustrates, the Irish courts will consider the rights of the parents of a minor child, in determining whether to enjoin or fund travel for an abortion.

D. *The C Case*

The first and, to date, only post-Travel Amendment abortion case brought before the Irish courts was *A and B v. E. Health Bd.* ("*C Case*").¹¹⁸ This case involved a thirteen-year-old pregnant rape victim who was in the care of the state-run Eastern Health Board ("EHB"). The EHB petitioned the High Court for permission to take the girl to England for an abortion, but her father opposed the petition.¹¹⁹ The High Court held that the EHB was permitted to take C to England for an abortion because, as in the *X Case*, the girl was considered suicidal and therefore a real and substantial risk to her life existed if the

¹¹⁵ Ivana Bacik, *Abortion - Time for Change*, IRISH COUNCIL FOR CIVIL LIBERTIES, Nov. 1998, available at <http://www.iol.ie/~iccl/feb981.htm>.

¹¹⁶ See MacLean, *supra* note 14, at 560.

¹¹⁷ CASEY, *supra* note 103, at 443.

¹¹⁸ [1998] 1 I.L.R.M. 460 (Ir. H. Ct.) [hereinafter *C Case*].

¹¹⁹ The girl's father was an Irish Traveller. "Irish Travellers are an indigenous minority with a distinctive lifestyle and culture based on a nomadic tradition." Buckley, *supra* note 36, at n.5. For more information on Irish Traveller's, see Pavee Point Culture, at http://www.paveepoint.ie/pav_culture_a.html (last visited Nov. 1, 2002).

pregnancy were to continue.¹²⁰ Although the case did not directly implicate the Travel Amendment,¹²¹ Justice Geoghegan, writing for the court, nevertheless, addressed it:

[The Travel Amendment] is framed in negative terms and must, *in my view, be interpreted in the historical context in which it was inserted.* There was, I think, a widespread feeling in the country that a repetition of the [X Case] should not occur in that nobody should be enjoined from actually travelling out of the country for the purpose of an abortion. It must be remembered that three out of the five judges of the Supreme Court took the view that in an appropriate case a travel injunction could be granted. It was in that context, therefore that the amendment was made and *I do not think it was ever intended to give some new substantial right.* Rather, it was intended to prevent injunctions against travel or having an abortion abroad. A court of law, in considering the welfare of an Irish child in Ireland and considering whether on health grounds a termination of pregnancy was necessary, must, I believe, be confined to considering the grounds for termination which would be lawful under the Irish Constitution and cannot make a direction authorising travel to another jurisdiction for a different kind of abortion. The amended Constitution does not now confer a right to abortion outside of Ireland. It merely prevents injunctions against travelling for that purpose.¹²²

Justice Geoghegan's statements leave many questions unanswered regarding the scope of the Travel Amendment.¹²³ For

¹²⁰ The finding of a suicide as a qualifier to legal abortion is rather curious considering that suicide is absolutely prohibited by the Roman Catholic Church. Such a finding seems to be in direct contradiction of the natural law tradition of Ireland. "[I]t seems likely that what the X and C cases really sought was a rape exception to the right to life of the unborn." Buckley, *supra* note 36, at 306.

¹²¹ The Travel Amendment issue "was not one on which [Justice Geoghegan] . . . addressed either by counsel for the State or for the Health Board." GREEN PAPER, *supra* note 83, at 20.

¹²² C Case, [1998] 1 I.R. at 478 (Ir. H. Ct.) (emphasis added).

¹²³ See Buckley, *supra* note 36, at 304-5 for an interesting discussion of the consequences of the C Case and the unanswered questions regarding state funded abortions.

It is clear from the C case decision that as the law currently stands, any child in the care of a health board who is pregnant and suicidal is entitled to have an abortion funded by the Irish State . . . [w]hat is unclear is what would happen to a young, pregnant, suicidal girl whose parents would not allow her to have an abortion. If the risk is considered 'real and substantial' and her parents refuse to let her have an abortion, are there grounds for her being put into state care? Certainly if the child's life is considered

example, if the court had found that the girl in *C* was not suicidal, the existing remedy presumably would have been to enjoin the EHB from taking her to England for an abortion. The distinction between a “freedom to travel” and a “right to travel” is far from clear. The High Court has stated that the Travel Amendment does not create a substantive right to travel to have an abortion and that the Travel Amendment should be viewed within the context of the social response to the *X Case*. Apparently it remains an open issue concerning upon whom the Amendment confers these freedoms. For example, does a minor, suicidal or not, in the face of parental objection have an independent “freedom to travel” under the Amendment? The High Court seems to imply that, at least when faced with parental objection of a minor’s traveling abroad for an abortion, “proceedings could be issued[,] for example under the Guardianship of Infants Act, 1964 . . . and that in these circumstances a court should determine the issue by reference to the right to life of the unborn guaranteed in Article 40.3.3. and not by reference to the constitutional freedom to travel.”¹²⁴

Perhaps it is better stated that currently the Travel Amendment provides a “qualified freedom” to travel to another country for an abortion. While the wording of the Travel Amendment may be clear as it relates to Article 40.3.3., this case seems to say that when the court is petitioned for permission to take a minor outside of Ireland for an abortion, it will look to the interests of third parties (such as parents) and balance the right to life of the minor with the right to life of the

at risk by an Irish court, it would be grounds for her being put into care, per Section 18(1) of the Child Care Act.

Id.

The Irish government has stated that Justice Geoghegan’s remarks in the *C Case* “are problematic”:

The logical implication is that proceedings could be issued, for example under the Guardianship of Infants Act, 1964, in a case in which parents are in dispute with their minor daughter over whether she should travel for an abortion (or the parents themselves disagree on this issue) and that in these circumstances a Court should determine the issue by reference to the right to life of the unborn guaranteed in Article 40.3.3. and not by reference to the constitutional freedom to travel. It may be argued in the alternative that in such a case the freedom to travel should determine the issue.

GREEN PAPER, *supra* note 83, at 20.

¹²⁴ GREEN PAPER, *supra* note 83, at 20.

unborn. A logical corollary to this case, and a yet unanswered question is whether a biological father has standing to petition the court for a travel injunction. A fair reading of the *C Case* would seem to permit such an application and would mark a substantial qualification to the Travel Amendment.

E. *Summary of Current Irish Abortion Law*

The current state of Irish abortion law can be summarized as follows: Abortion in Ireland is illegal under the Irish Constitution, unless a substantial risk to the life of the mother is present; the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, 1995 defines the legal parameters for providing information on abortion services abroad; and “*in general*, women can travel abroad for an abortion.”¹²⁵

III. WOMEN ON WAVES: A FAILED TEST CASE?

At first glance, any freedom of choice advocate would be intrigued by the creativity of Women on Waves. Indeed when viewed within the historical context of Irish abortion law, this activism takes on an impressive level of sophistication. Considering the backlash that Ireland felt surrounding the *X Case*¹²⁶ and the uncertainty of future ECJ decisions regarding Irish abortion law, it is hard to imagine that the Irish government would enter this arena again without considerable misgivings. But when faced with the brazen nature of Women on Waves, and the inevitable public discourse from the anti-abortion movement, the Irish authorities could be forced to address the issue.

Under these circumstances, seeking to enjoin its nationals from obtaining abortions in international waters could arguably be the least restrictive method of addressing the issue.¹²⁷ Al-

¹²⁵ *Id.* at 3 (emphasis added).

¹²⁶ See *supra* note 102 for a discussion of the post-X reaction. See also *supra* note 85-98 and accompanying text for a detailed discussion of the X Case.

¹²⁷ This comment is limited to the discussion of enjoining Irish nationals and does not address the issue of potential criminal charges being brought against Irish nationals upon return to shore from receiving abortions in international waters. The unpredictability of the imposition of criminal sanctions was one of the main concerns voiced by the Women on Waves organization. “Gomperts worries that women who have received shipboard abortions might face legal sanctions from their own countries. In fact, the island of Malta and its Catholic bishops were

lowing an "abortion boat" to dock in its port, pick up its citizens, and travel twelve miles from its shore to provide abortions

infuriated, claiming, "We are ready to prosecute any person that colludes or collaborates with the doctor." Judith LaPook, *'Women on Waves' to Provide Offshore Abortions Abroad*, WESTCHESTER COALITION FOR LEGAL ABORTION, available at <http://www.wcla.org/00-summer/waves.html> (last visited Oct. 13, 2002). Ireland did not publicly threaten its nationals with potential criminal sanctions. As indicated earlier in this comment, Ireland does criminalize abortion, but such prosecution is not commonly exercised. "There is some evidence of . . . prosecutions under the Offences Against the Person Act, 1861, in particular during the mid-1940s, when wartime restrictions on travel between Ireland and England were imposed. No prosecution under the Act has taken place since 1974." GREEN PAPER, *supra* note 83, at 17. Further, it is doubtful that Ireland would prosecute women upon return to Ireland especially *inter alia*, in light of the international condemnation of such German practice.

Some German authorities adopted a different tack under the former West German abortion law, seeking to impose domestic criminal penalties on women for obtaining abortions in more permissive countries. German border guards forced gynecological examinations upon women reentering Germany at the Dutch border in the search for evidence of extraterritorial abortions, while prosecutors brought criminal charges against German women upon their return from abortions obtained in other European countries with more permissive laws.

Kreimer, *supra* note 34, at 458. See *id.* at 458 n.23 for an excellent discussion and a wealth of citations (reprinted below) on the German inspection and prosecution of its returning nationals: See Debates, 1991 O.J. (Annex 3-403) 202-05 (Mar. 14, 1991) (Debates of European Parliament) (debate on resolutions condemning compulsory gynecological examinations by German officials of returning German women at the Dutch-German border); *id.* at 203 (statement of Rep. Van Den Brink) ('over 6000 German women have had . . . abortion[s] in the Netherlands'); *id.* at 204 (statement of Rep. Keppelhoff-Wiechert) (defending searches on the ground that officials 'are required by the code of criminal procedure to investigate illegal abortions of this kind carried out abroad where there are grounds for suspecting that such has been committed . . .'). See also Karen Y. Crabbs, *The German Abortion Debate: Stumbling Block to Unity*, 6 FLA. J. INT'L L. 213, 222-23 n.103 (1991) (account of prosecutions, searches, and examinations of returning German women); Nina Bernstein, *Germany Still Divided on Abortion*, Newsday, March 11, 1991 (providing account of German woman returning from Netherlands who was forced to submit to vaginal examination at Catholic hospital near border and charged with illegal abortion; noting that study by Max Planck Institute finds that such 'inquisitions' are 'standard practice'). The European Parliament condemned the searches and resolved that 'the internal borders of the European Community may not be used to threaten citizens with prosecution for activities that are perfectly legal in some Members States but not in others.' Resolution on Compulsory Gynecological Examinations at the Dutch-German Border of March 14, 1991, 1991 O.J. (C 106) 113.

For an in-depth analysis of abortion and Irish criminal law, see generally M.J. Findlay, *Criminal Liability for Complicity in Abortions Committed Outside Ireland*, 15 IR. JURIST 88 (1980). Note that the Findlay article may be moot due to the passage of the Travel Amendment. See KINGSTON, *supra* note 10, at 53 n.3. See also *id.* at 52-78 for a discussion of abortion and Irish criminal law.

would seemingly make a mockery of Ireland's current "out of sight, out of mind" abortion philosophy.¹²⁸ There can be little doubt that Women on Waves can reasonably be viewed as an intolerable insult, if not an outright threat, to Ireland's moral sovereignty.¹²⁹

Although it is impossible to predict the Irish government's response to Women on Waves or the variety of legal defenses that would be asserted had Women on Waves been successful, below are four potential test case scenarios:

(1) If the High Court upon petition of the Attorney General, enjoined its nationals from boarding the *Aurora*, the Supreme Court and/or the ECJ would undoubtedly be presented with a claim that such a restriction violates both the Travel Amendment and EC law. This scenario in essence would continue the direction suggested by the *X Case* by having the issue of travel restriction directly reviewed by the courts of the EC.

(2) Even if the High Court denied the Attorney General's petition for an injunction, the *C Case* appears to hold that certain third parties may have an independent constitutional right to petition for an injunction. Therefore, if parents of a minor child or a biological father were to petition the court for an injunction, the court would presumably balance the right to life of the mother against the right to life of the unborn. If an injunction was ordered, the pregnant woman could rightly appeal arguing that such an injunction violates her constitutional "freedom" or "right" under the Travel Amendment and violates her freedom of movement under the EC Treaty.

¹²⁸ "Mr Joe Higgins (Socialist Party, Dublin West) said it would be more honest if the Taoiseach presented each woman with a crisis pregnancy with a map of England, and, perhaps, a ferry ticket, because the Government did not want to know anything about them and preferred to shut their eyes to their predicament." Michael O'Regan, *Taoiseach Says Abortion Poll Has No European Dimension*, THE IRISH TIMES, Oct. 10, 2001, at 7.

¹²⁹ Dr. Gomperts has recognized the brazen nature of her activism.

Gomperts acknowledges that her project 'is a shocking idea.' But she defends it as 'an emergency solution to a shocking reality. We can circumvent national laws like this, but that is not the main purpose,' she insists. 'The main purpose is to offer a much-needed service and to draw attention to what is happening. Twenty million of the 53 million abortions performed each year around the world are illegal and often unsafe', Gomperts points out, and '100,000 women die each year during such illegal operations.'

Ford, *supra* note 8.

(3) If the Irish authorities were to prosecute Women on Waves Ireland for violating the Regulation of Information (Services outside the State for Termination of Pregnancies) Act, 1995 ("Information Act"),¹³⁰ the ECJ could be forced to review whether this legislation and for that matter, the Fourteenth Amendment, are compatible with EC law. It appears that Women on Waves Ireland may be in violation of this legislation in that its published language on its web page could be viewed as impermissibly advocating abortion.¹³¹

(4) Finally, the possibility exists that Women on Waves Ireland could be viewed as having the required *Grogan* "economic nexus" with Women on Waves. As discussed earlier, Women on Waves Ireland describes itself as "the partner organization in

¹³⁰ See *supra* note 113 for a discussion of the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, 1995. Casey summarizes the pertinent sections of this Act as:

The 1995 Act closely regulates the provision of information about abortion services abroad. Section 4 prohibits the display of public advertisements, and the distribution of unsolicited publications, containing such information. Under section 5 those providing information must not advocate or promote the termination of the pregnancy, and they must advise the woman of all of the courses of action open to her. Section 6 prohibits any economic links between the information-giver and those providing abortion services outside the State, while section 7 decrees that the information-giver may not receive financial or other benefits by reason of supplying the information. Nor may the information-giver make an appointment or any other arrangements on the woman's behalf with the foreign provider of services: section 8. Finally, section 13 specifically recognises conscientious objections to the provision of relevant information.

CASEY, *supra* note 103, at 443. See also HOGAN & WHELAN, *supra* note 106, at 144 (acknowledging the potential point of conflict in Act's prohibition of economic links between information-givers and abortion providers in other Member States). See Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, 1995, available at <http://www.ifpa.ie/download/InfoAct.pdf>.

¹³¹ Women on Waves Ireland states on its web page: "By educating the public about the social and medical issues concerning unwanted pregnancy and the need for access to safe, legal abortion services, Women on Waves Ireland will catalyze efforts to liberalize abortion laws in Ireland." *About Women on Waves in Ireland*, *supra* note 16. Additionally, "[t]his is part of a wider campaign to get the law changed so that we no longer have to send more than 6,300 women to Britain every year to have abortions. And there are many other women in Ireland who are not able to take up this option." "Morning After Pill" For Whoever Needs It, at http://www.womenonwaves.net/ireland/news/leaf_morn_after.html (last visited Oct. 13, 2002) (emphasis added).

Ireland to the Women on Waves Foundation.”¹³² If this “economic nexus” is established, Women on Waves Ireland’s activities would be permissible under EC law but at the same time would violate Section 6 of the Information Act, which prohibits such a nexus.

The *Aurora*’s presence off the coast of Ireland coupled with the *Open Door* and *Grogan* rulings provides fertile ground for the EC courts to directly address the conflicts between Irish and EC law. For abortion rights activists who want to hurry the liberalization of Irish abortion law, the EC courts might appear to be a promising venue. However, this comment asserts that political considerations should cause the ECJ to steer away from an attempt to reconcile any existing legal incompatibility between EC and Irish law under these set of facts. The high degree of moral sovereignty implicit in abortion, public policy and the goal of overall political harmony of the Member States of the EC dictates that Ireland should be allowed to exercise the reasonable response of enjoinder.

IV. ENJOINING ABORTION IN INTERNATIONAL WATERS AND THE TRAVEL AMENDMENT

The Irish courts, to date, have not directly addressed the Travel Amendment and how it relates to Article 40.3.3.. The lack of case law interpreting the Travel Amendment and abortion gives the Irish courts a certain amount of flexibility enabling them to justify injunctions in this unique setting.

The courts could distinguish between traveling into international waters for abortions and traveling to England or other Member States for abortions on several grounds. “[E]ven though the [Travel] Amendment specifically states that it will not interfere with an individual’s freedom to travel to another state . . . [t]he words of the Amendment would seem to protect only against the *overbroad restriction* on any pregnant woman from traveling”¹³³ Injunctions in this case would be strictly limited to traveling for abortions in international waters, thus enabling Ireland to address this situation.

¹³² *About Women on Waves in Ireland*, *supra* note 16. This issue is beyond the scope of this article.

¹³³ MacLean, *supra* note 14, at 564 (emphasis added).

It is certainly within the court's power to interpret the plain meaning of the Amendment to preclude an interpretation that a Dutch registered vessel is "another state" within the context of the Amendment. Support for such an interpretation can be found in Justice Geoghegan's obiter *dicta* in the *C Case*, that the Travel Amendment must "*be interpreted in the historical context in which it was inserted.*"¹³⁴ As the Travel Amendment was passed in direct response to the *X Case*,¹³⁵ the court could limit the scope of the Amendment in this instance because traveling into international waters for an abortion was simply not a part of the historical context in which the Amendment was passed. Additionally, Justice Geoghegan's statements in the *C Case* that "[t]he amended Constitution does not now confer a *right* to abortion outside of Ireland . . . [i]t merely prevents injunctions against travelling for that purpose,"¹³⁶ can similarly be limited to the only historical context that Ireland has ever known with regard to abortion tourism — on land. Furthermore, the court could find an injunction justified on public health grounds, in light of health risks associated with obtaining an abortion on the rough waters of the Irish Sea.¹³⁷

¹³⁴ *C Case*, [1998] 1 I.R. at 478 (Ir. H. Ct.) (emphasis added). The pertinent part of Mr. Justice Geoghegan's opinion may also be found in GREEN PAPER, *supra* note 83, at 20.

¹³⁵ "The Thirteenth Amendment concerns potential restrictions on travel arising from remarks by three judges in *Attorney General v. X*." KINGSTON, *supra* note 10, at 180. In fact, because of the political dilemma that existed after the *X Case*, but before the ratification of the Maastricht Treaty, then Prime Minister Reynolds stated that a constitutional amendment would be the most likely way of protecting the right of Irish women to travel to other states within the EC. See MacLean, *supra* note 14, at 559 n.275.

¹³⁶ *C Case*, [1998] 1 I.R. at 478 (Ir. H. Ct.).

¹³⁷ "Anyone who has crossed the Irish Sea knows it's no duck pond. A haircut, dental cleaning, even applying mascara could be hazardous in its frequent rough swells . . . but surgery!" Wills, *supra* note 22. The difficulties of providing abortions on the open seas was acknowledged by Women on Waves Ireland. "[W]eather conditions and other factors may lead to difficulties in travelling outside territorial waters on any given day." Press Release, Women on Waves Ireland, Women on Waves Ireland Asks Women Not to Cancel Counselling Appointments (June 14, 2002), at http://www.womenonwaves.net/ireland/news/pr_no_cancel.html (last visited Oct. 13, 2002).

While the ship will have a fully equipped clinic with facilities for safe abortions, it is not envisaged that surgical abortions will be carried out on the ship when it visits Ireland because of the availability of land-based legal abortion in Britain. All activities on board the ship will have women's health as their absolute priority, and will be completely lawful.

That the Irish court could justify enjoining women from traveling into international waters for an abortion under Irish law does not end the analysis. As stated earlier, it would seem that the passage of the Travel Amendment harmonized Irish and EC law regarding the right to travel. But even before the *C Case* demonstrated the existence of a possible exception, it was clear that:

[t]he provisions of the Thirteenth . . . Amendment . . . do not give a *right* to abortion or termination of pregnancy where none existed prior to their enactment. Thus, Ireland is still 'within the realm of the derogations from the fundamental . . . freedoms' guaranteed by Articles 49 and 50 of the EC Treaty, and, despite the evasive maneuvering and the constitutional amendments, the potential for conflict still exists between EC law and Article 40.3.3..¹³⁸

It is apparent that if Ireland enjoined women in this context, it would be forced to address how such a finding is compatible with its obligations under EC law.

V. ENJOINING ABORTION IN INTERNATIONAL WATERS AND THE APPLICATION OF PROTOCOL NO. 17

Although Ireland attached the Declaration to the Maastricht Treaty, stating its intention not to interfere with the freedom to travel, the Declaration can reasonably be viewed as a statement of intent, arguably with no binding effect.¹³⁹ Even so, these circumstances require broader analysis than simply relying on Protocol No.17, which requires the ECJ to defer to Irish law when a conflict between EC law and Article 40.3.3.

Press Release, Women on Waves Ireland, Women on Waves Ship Comes to Ireland (May 30, 2001), at http://www.womenonwaves.net/ireland/news/pr_about_june30.html.

¹³⁸ MacLean, *supra* note 14, at 560 (emphasis added).

¹³⁹ Leading scholars have stated:

A declaration is a unilateral statement of policy or opinion that, like an understanding, is not intended to alter or limit any provision of the treaty. It is considered to have the least effect on the original treaty text and is used primarily to articulate a signatory's purpose, position, or expectation, concerning the treaty in question.

BURNS H. WESTON, ET AL., INTERNATIONAL LAW AND WORLD ORDER 93 (3rd ed. 1997). See also *supra* note 108 for a brief discussion and further sources relating to the legality of the Declaration. See *supra* note 107 and accompanying text, reprinting the relevant portion of the Declaration.

arises.¹⁴⁰ The Protocol nullifies EC law as it relates to the application of Article 40.3.3. *in Ireland*. Whether Ireland may successfully invoke Protocol No.17 in this circumstance depends on whether the ECJ finds the proposed injunctions to be an application of 40.3.3. *in Ireland* as the language of the Protocol states.¹⁴¹

This language warrants a brief analysis. Travel injunctions in this case may be interpreted either as an application of 40.3.3. *in Ireland*, affording Ireland the protection of Protocol No. 17, or conversely, may be interpreted as having extra-territorial implications, thus removing the Protocol's protection from ECJ review.

Sound arguments can be made for either interpretation. One argument for finding travel injunctions to be an application of 40.3.3. *in Ireland* is made by distinguishing between two types of injunctions: (1) those aimed at preventing nationals who are still in Ireland from leaving the jurisdiction, and (2) injunctions aimed at nationals who have already left Ireland.¹⁴² The latter type of injunction would obviously not be an application of 40.3.3. *in Ireland* but rather an attempt to apply 40.3.3. extra-territorially, and as such would not be afforded the protections of the Protocol. But Protocol No. 17 probably would ap-

¹⁴⁰ See *supra* note 83 and accompanying text for a discussion of Protocol 17. As Protocol 17 was adopted prior to the Travel Amendment, an issue remains as to whether Protocol 17 applies to the Travel Amendment at all.

In relation to possible amendment of Article [40.3.3.], the Protocol would seem not to restrict the power to amend the Article, as it seeks only to exclude Community law from affecting the application in Ireland of this constitutional provision. Any amendment would therefore be a matter for domestic law. *However, the question has been raised whether an amendment would automatically obtain the benefit of the immunity from Community law provided by the Protocol.* This is because it is unclear from the wording of the Protocol whether the Article [40.3.3.] referred to in the Protocol is that which existed at the time of ratification of the Treaty on European Union [Maastricht Treaty] or could include any later amendment of it. On the one hand, legal certainty would seem to require that our Community partners should only be bound by that version of Article [40.3.3.] which existed at the time of the ratification of the Treaty. On the other hand, it could be argued that the intention of the Protocol was to leave these matters entirely to Irish constitutional law and that therefore any later changes to Article [40.3.3.] are covered by the Protocol.

GREEN PAPER, *supra* note 83, at 25 (emphasis added).

¹⁴¹ See HOGAN & WHELAN, *supra* note 106, at 146.

¹⁴² See *id.* at 147.

ply to the former type of injunction as it is directed at Irish women within Ireland and "since [this] injunction would not be extra-territorial in either its operation or effect" ¹⁴³

One argument for finding travel injunctions outside the protection of the Protocol is that an injunction which seeks to control the exit of nationals is specifically designed to prevent an activity that is legal in other Member States, and therefore the very nature and effect of the injunction is not limited to an application of 40.3.3. *in Ireland*.¹⁴⁴ Because of the ambiguity of the language of Protocol No. 17, the ECJ would, in all likelihood, have to address the argument that enjoining travel is a derogation of the right to avail oneself of services and freedom of movement of persons conferred by Articles 59 and 60 [currently Articles 49 and 50].

VI. ENJOINING ABORTION IN INTERNATIONAL WATERS: PERMISSIBLE DEROGATION OF EUROPEAN COMMUNITY LAW

It is necessary to define Ireland's obligations under EC law before assessing whether an injunction would run counter to these obligations.¹⁴⁵ The ECJ relies on the European Convention of Human Rights ("Eur.Conv.HR") as a source of community rights. This reliance was reaffirmed in the Maastricht Treaty.¹⁴⁶ "Article F(2) [currently Article 6(2)] of the Treaty provides that the Union shall respect the fundamental rights, *inter alia*, as guaranteed by the [Eur.Conv.HR], as general principles of Community Law."¹⁴⁷ The ECJ has defined general principles of community law as "customary rules, derived from the Member States' common legal heritage," that have "evolved from continental administrative law standards and certain fundamental rights."¹⁴⁸ Further, the ECJ is not limited to drawing inspiration from the Eur.Conv.HR, but can look to the "constitutional traditions common to the Member States."¹⁴⁹ "These

¹⁴³ *Id.* at 147-48 (internal quotations omitted).

¹⁴⁴ *See id.* at 147.

¹⁴⁵ *See* GREEN PAPER, *supra* note 83, at 22.

¹⁴⁶ *See id.*

¹⁴⁷ *Id.*

¹⁴⁸ MacLean, *supra* note 14, at 539.

¹⁴⁹ *Id.* For a brief history of the sources of ECJ law, see *The Amsterdam Treaty: a Comprehensive Guide*, EUROPA, at <http://europa.eu.int/scadplus/printversion/en/lvb/a10000.htm> (last visited Oct. 14, 2002). As there is no commonality of

'fundamental rights' include 'human rights,' and are typically more political and social, rather than economic, in nature. The ECJ expressly stated that the EC cannot accept measures which are incompatible with observance of the human rights recognized and guaranteed by the [Eur.Conv.HR]."¹⁵⁰

A collection of articles in the EC Treaty are said to establish the four freedoms which the ECJ must ensure: "the free movement of goods, persons, services and capital across Member States' borders."¹⁵¹ In addition to the four freedoms, Article 59 [currently Article 49] of the EC Treaty requires the elimination of discrimination against member service providers and prohibits "any restriction . . . when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services."¹⁵²

A cursory reading of the articles outlined above, coupled with Ireland's stated intent of not restricting travel between Member States in its Declaration to the Maastricht Treaty¹⁵³ could lead to the conclusion that any travel injunctions pertaining to abortion would be contrary to established EC law as there is a fundamental freedom for individuals of Member States to travel to avail themselves of member services.

However, an extraordinarily important public policy exception in the EC Treaty is essential to this discussion. "Under Article 46 and Article 55 of the EC Treaty, Member States may enact regulations that restrict the fundamental freedoms granted under Articles 49 and 50 on the 'grounds of public pol-

constitutional traditions relating to abortion between the Member States, presumably the ECJ would be limited to relying on the Eur.Conv.HR as a source of fundamental rights in this situation. Further, the probable expansion of the EC in 2004 will further solidify the non-commonality of Member State traditions relating to abortion as seven of the ten applicant countries have restrictions or bans on abortion. See Frydryh, *supra* note 32. See generally *supra* note 32, discussing the Irish Referendum on the Treaty of Nice and likely expansion of the EU.

¹⁵⁰ MacLean, *supra* note 14, at 539-40.

¹⁵¹ *Id.* at 540. "Articles 43 through 48 guarantee that citizens of Member States cannot be restricted on freedom of establishment, and Articles 49 through 55 guarantee the freedom to provide services." *Id.*

¹⁵² *Id.* at 541 (citing Case C-76/90, 1991 E.C.R. I-4221, I-4243, [1993] 3 C.M.L.R. 639 (1991)). See *supra* note 77 for the text of Article 59 [currently Article 49].

¹⁵³ See *supra*, note 108 for a brief discussion of the questionable binding effect of the Declaration.

icy, public security and public health.'"¹⁵⁴ The condition to this exception is that "[t]he freedom to provide services can only be limited by rules which are justified by 'overriding reasons relating to the public interest.' These requirements must be 'necessary' and must not exceed what is necessary to attain those objectives."¹⁵⁵ Ireland should be able to successfully invoke the public policy exception to curtail offshore abortions.

Ireland could argue that Women on Waves is a political organization as opposed to a medical services organization and that it is attempting to use international waters as a jurisdictional mask to circumvent Irish abortion law and as such should not be considered a "service provider" within the context of EC law. Alternatively, the injunctions are a permissive derogation of EC law under the public policy exception of Articles 46 and 55 of the EC Treaty.¹⁵⁶

A. *Women on Waves is not a "Legitimate" Service Provider Argument*

The ECJ's holding of abortion as a service in *Grogan*, "transformed cross-border access to abortion into an economic right protected by the EEC Treaty."¹⁵⁷ Articles 59 and 60 [currently Articles 49 and 50] guarantee the freedom to provide services, but the ECJ in *Luisi and Carbone v. Ministero del Tesoro*¹⁵⁸ ("Luisi") "extended the reach of these articles . . . to protect the freedom both to receive services and to travel to another Member State to receive services."¹⁵⁹ Therefore, the Irish abortion issue "[can] no longer be characterized purely as a mat-

¹⁵⁴ MacLean, *supra* note 14, at 541-42. See generally PHELAN, *supra* note 72, at 392-400 (criticizing the ECJ for its interpretation of derogations based on the public policy exception).

¹⁵⁵ MacLean, *supra* note 14, at 542 (quoting Case C-353/89, *Comm'n v. Netherlands*, 1991 E.C.R. I-4069, I-4093-94 (1991)).

¹⁵⁶ The ECJ

maintains significant power over how much deviation from European Community law Member States will be allowed in pursuing their public policies. Recognizing the threat to equality of access presented by derogation, the ECJ has construed the concept of 'public policy' grounds strictly, requiring a showing of a 'genuine and sufficiently serious threat affecting one of the fundamental interests of society.'

Hilbert, *supra* note 83, at 1151-52.

¹⁵⁷ Hilbert, *supra* note 83, at 1150.

¹⁵⁸ Joined Cases 286/82 & 26/83, 1984 E.C.R. 377, 1985 3 C.M.L.R. 54 (1984).

¹⁵⁹ Hilbert, *supra* note 83, at 1145.

ter of substantive individual rights under Irish law; now abortion had been cast as a 'service' within the web of European Community commercial relations."¹⁶⁰

Accordingly, the ECJ should examine the following questions, which arise from this situation: does the non-economic intent of political activism and the manner in which a Member State purports to provide a service alter the analysis as to who is a legitimate service provider? These questions are separate from questions of morality and indeed may be broader in scope than the public policy exception allows. Arguably, the ECJ would have to address the political question of whether it views *Women on Waves* as subverting EC law by masking itself as a legitimate service provider and seeking the sanction of EC law for political purposes.¹⁶¹ Such an inquiry is not unprecedented, as the ECJ in *Luisi*, "indicated a willingness to examine challenged activities to determine if they fit the concept of 'service' under Articles 59 and 60 [currently Articles 49 and 50] and, if so, to extend the status of protected economic rights to such activities."¹⁶² Although the ECJ, in *Grogan*, declared abortion to be a "service," nothing precludes the court from examining the manner in which this service is provided and the underlying motives of the service provider. Under these articles, the ECJ might decline to regard *Women on Waves* as a "legitimate" service provider because a finding to the contrary would undermine the political unity objectives of the EC states.

B. *Public Policy Exception Argument*

As noted above, Articles 46 and 55 of the EC Treaty permit Member States to enact restrictions that limit the fundamental freedoms granted under Articles 49 and 50 on the grounds of public policy, public security and public health. This exception appears to provide for Member State independence within certain areas of governance. "The import of this exception is that

¹⁶⁰ *Id.* at 1150.

¹⁶¹ "This is guerrilla activism, the feminist version of fighting logging policies by hijacking a tree. Gomperts hopes that by skirting nations' abortion laws, she will ultimately overturn them. 'I want these countries to change their laws,' she explains. 'The only way to get the law changed is to push the issue.'" Thornton, *supra* note 8.

¹⁶² Hilbert, *supra* note 83, at 1145-46.

the domestic law of a Member State may trump European Community law if it meets the requisite proportionality test.”¹⁶³

Therefore, if a Member State asserts valid public policy grounds for its domestic regulations, even if those regulations affect transborder access to services, it may be beyond the jurisdictional reach of the ECJ.¹⁶⁴ The public policy exception does not, however, exempt domestic regulation from ECJ review. “Recognizing the threat to equality of access presented by derogation, the ECJ has construed the concept of ‘public policy’ grounds strictly, requiring a showing of a ‘genuine and sufficiently serious threat affecting one of the fundamental interests of society.’”¹⁶⁵

In rebutting the argument that Ireland’s actions violate EC law, Ireland would have to show: (1) that enjoining nationals from obtaining abortions in international waters relies “on imperative requirements of public interest”; (2) that enjoining nationals from obtaining abortions in international waters “is consistent or not incompatible with the aims laid down in the Treaty provisions”; and (3) that enjoining nationals from obtaining abortions in international waters “passes the proportionality test.”¹⁶⁶

1. *A Travel Injunction Relies on Imperative Requirements of Public Interest*

Consistent throughout Ireland’s evolving abortion law is the majority view that abortion is morally wrong and will be permitted in Ireland only when there is a real and substantial risk to the life of the mother. Moreover, the protection of the life of the unborn is a constitutional requirement that supercedes the majority’s moral conviction. “[T]he Irish constitutional provision against abortion is not based on the question of morality but is based on the right of the individual life.”¹⁶⁷ When presented with a threat to a constitutionally protected right,

¹⁶³ *Id.* at 1151.

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 1151-52 (quoting Case 30/77, *Regina v. Pierre Bouchereau*, 1977 E.C.R. 1999, 2014; 2 C.M.L.R. 800, 825 (1977)).

¹⁶⁶ MacLean, *supra* note 14, at 562.

¹⁶⁷ PHELAN, *supra* note 72, at 400 n.127 (quoting Brian Walsh, *Reflections on the Effects of Membership of the European Communities in Irish Law in* (1987) C-D. EHLERMAN, ET AL., *DU DROIT INTERNATIONAL AU DROIT DE L’INTEGRATION* (1989)).

Ireland has an affirmative constitutional obligation to counter this threat.¹⁶⁸

Ireland should not be prevented from aggressively confronting a perceived threat to the public interest. The opinion of Advocate General Gulmann in *Her Majesty's Customs and Excise v. Schindler* ("*Schindler*")¹⁶⁹ is applicable to this case: "[S]trong grounds can be put forward for holding that national rules which contain a general prohibition of a specified activity and which are neither overtly or covertly discriminatory are not incompatible with Article 59 [currently Article 49] of the Treaty."¹⁷⁰

In *Schindler*, the ECJ found England's legislation restricting Member State importation of advertisements and lottery tickets to be a permissive derogation of EC law based on the public policy exception. Through *Schindler*, the ECJ established that Member States may protect themselves from perceived threats to public policy. The considerations that the ECJ concluded were valid included preemptive restrictions relating to crime prevention, and "to avoid stimulating demand . . . for a service which has damaging social consequences."¹⁷¹

Implicit in this ruling is the validity of the restriction's focus being on the consumers as well as the maintenance of order in society.¹⁷² Accordingly, Ireland could argue that the injunctions are permissively directed at their nationals who are "consumers" of the service of abortion and that Women on Waves is facilitating a stimulation of a service that is counter to their public policy.¹⁷³ Certainly, Women on Waves could reasonably

¹⁶⁸ Indeed, Justices Findlay and Hederman, in the X Case, "stated clearly that the Attorney [General] had not been merely entitled, but bound to institute the relevant proceedings." CASEY, *supra* note, 103 at 437 n.110. On the other hand, prosecutorial discretion is a recognized legal principle in Ireland.

¹⁶⁹ Case C-275/92, 1994 E.C.R. I-1039, 1995 1 C.M.L.R. 4 (1994) [hereinafter *Schindler*].

¹⁷⁰ MacLean, *supra* note 14, at 563 (quoting *Schindler*, 1994 E.C.R. at I-1060, [1995] 1 C.M.L.R. at 24 (opinion of Advocate General Gulmann)).

¹⁷¹ *Id.* at 567.

¹⁷² *See id.*

¹⁷³ Women on Waves stated that one of their goals was to service those women who could not afford the travel fare to England to have an abortion. "[L]arge numbers of Irish women continue to require abortion services and the double burden of coping with a crisis pregnancy and the trip to England particularly affects low-income women." Women on Waves Ireland Asks Women Not to Cancel Counseling Appointments, *supra* note 137.

be seen as a perceived threat to Ireland's public policy, and as such, Ireland would be entitled to protect itself against this threat.

2. *A Travel Injunction is not Incompatible with the Aims of the European Community Treaty*

Having established that there is an imperative requirement of public interest, Ireland must prove that this restriction outweighs the freedom of movement. "[T]he ECJ has held that the fundamental freedoms are strong, but rebuttable, presumptions."¹⁷⁴ Ireland would argue that the injunction is aimed at protecting the right to life of the unborn, which is a fundamental right under the Irish Constitution while the right to an abortion is not.¹⁷⁵

The aim of the Maastricht Treaty was the furtherance of political and economic unity among the Member States. When considering whether an injunction preventing offshore abortion is consistent with the aims of the Treaty, the ECJ, regardless of whether it finds injunctions to be protected under Protocol No. 17, cannot ignore its existence.

It must be remembered that Protocol No. 17 was inserted into the Maastricht Treaty in direct response to the ECJ holding abortion to be a service in *Grogan*. Collective recognition of the nationalistic quality of abortion regulation was apparent in the Member States' agreement to the insertion of the Protocol. One Member State targeting a fellow Member State with the express intent of forcing a change in its laws would seem to conflict with the spirit of the Treaty and can reasonably be seen as a direct threat to these goals. Injunctions intended to thwart offshore abortions should be seen as a justified and appropriate counter to a perceived threat that directly involves a subject matter that the Member States have previously acknowledged is within Ireland's exclusive sphere of governance.

3. *A Travel Injunction Passes the Proportionality Test*

The principle of proportionality is "employed to ensure that the restriction is necessary and the national rule does not have

¹⁷⁴ MacLean, *supra* note 14, at 565.

¹⁷⁵ See *id.* at 566.

any effects beyond what is necessary.”¹⁷⁶ Unlike the injunction in *Open Door*, which was found disproportionate by the ECHR, injunctions in this instance would not be perpetual or broad. This injunction would presumably be limited to the specific periods when the Women on Waves vessel was in Irish ports and travel to England or other Member States for abortions would still be permitted.

Use of injunctions, in this case, avoids the more problematic scenarios that might arise from other state action, such as impounding the ship or imposing criminal sanctions upon returning nationals and/or those who aid in their travel. With the acceptance of the principle that Ireland can act to protect itself against perceived threats to constitutionally protected rights, injunctions used in this preemptive manner would indeed appear to be the least restrictive means by which Ireland could meet its legitimate public policy goals.

VII. CONCLUSION

Ireland did not have to respond to Women on Waves in 2001 because the organization failed to obtain the proper Dutch abortion licensing. However, had Ireland been forced to respond, it is the position of this comment that it would have been justified in the measured response of enjoining its nationals from traveling twelve miles off the coast of Ireland to have abortions. It is unreasonable to expect a nation to sit idle when confronted by a challenge to its constitutional, criminal, moral and religious codes and beliefs.

Although the future may force the ECJ to compel Irish abortion law to comply with EC law, such an action will have to balance delicately Ireland’s religious and moral sovereignty against that of the greater European Community. The ECJ’s acknowledgement that issues of morality are to be determined by Member States, coupled with its history of evading the politically charged issue of abortion, dramatically tilt the odds against diminishing Ireland’s moral sovereignty in a case in which abortion is enabled through the evasive ploy of operations in international waters. Such a finding would place the

¹⁷⁶ *Id.* at 569.

ECJ in the politically untenable position of tampering with highly sensitive moral parameters of a democratic nation.

The people of Ireland are more than capable of liberalizing their abortion law, and the public outcry after the High Court's decision in the *X Case* and subsequent amendments to the Constitution provides strong evidence of this inclination. The critical question is not *whether* the law should be liberalized, but rather, which *judicial body* should oversee liberalization. Ireland has witnessed much healthy debate and movement in this area of law. Because of the deeply religious, historic, political and personal aspects of abortion, it is vital that this sophisticated republic sets its own course and defines its own laws. This wisdom is likely to prevail against the designs of activists trying to control the outcome of an evolving debate with momentous importance.¹⁷⁷

¹⁷⁷ There was not wholesale support for Women on Waves throughout the abortion rights community:

Some abortion rights advocates have expressed concern about the plan, fearing that the ship might create a backlash in some countries against efforts to legalize abortion. "The political consequences to women's groups in the countries where the ship may operate need to be taken into consideration," said Anika Rahman, director of international programs at the Center for Reproductive Law and Policy in Washington, D.C.

Joan Lowy, *Floating Clinic Would Provide Abortions*, CHICAGO SUN-TIMES, June 11, 2000. Knowing the power of the Irish pro-life movement, one must question if the risks of backlash for the Irish abortion rights movement was significantly considered by Women on Waves. The Irish counterpart to Women on Waves, Women on Waves Ireland, is comprised of well-respected leaders of the Irish abortion rights movement and leading Irish abortion law scholars. One would assume that such an affiliation would have been based on a calculation that the venture could produce a test case to bring to the ECJ. "[A]fter running afoul of Dutch medical licensing laws . . . the voyage began to look more like a clumsy PR exploit than a mission of mercy . . ." Thomas K. Grose, *An Abortion Ship on the High Seas*, US. NEWS & WORLD REPORT, June 25, 2001, at 30. Mary Muldowney, a spokesperson for the ship conceded that "the ship's crew had sailed [with] the knowledge that they didn't have the necessary papers." Nicola Byrne, *Dutch Activists Renege on Abortions Promise*, THE INDEPENDENT (London), June 16, 2001, at 2. Further, Women on Waves Ireland "were only told an hour before the ship's arrival that no women would be treated." Jenny Booth, *Abortion Boat Admits Dublin Voyage was a Publicity Sham . . .*, SUNDAY TELEGRAPH (London), June 17, 2001, at 10. That the venture was ended by the failure of Dr. Gomperts to procure the proper Dutch licensing evidences to this author that the political positioning of the Irish pro-choice movement was not carefully and intelligently considered by Women on Waves.

In 2001, Ireland's Minister of Health proposed a bill to the House of the Oireachtas (Irish Parliament) entitled Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001, available at <http://>

www.irlgov.ie/bills28/bills/2001/4801/default.htm (last visited Oct. 14, 2002). One of the intentions of this bill was to reverse the finding of the X Case — that suicide could be considered a substantial risk to the life of the mother. The Department of Health and Services explanation regarding the proposed changes to the Constitution included:

[t]he unborn will continue to be protected by Article 40.3.3 of the Constitution. In addition, the Protection of Human Life in Pregnancy Act will contain a specific prohibition on abortion. *A threat of self-destruction (i.e. suicide) on the part of a pregnant woman will not be grounds for terminating her pregnancy.* The Government wants to afford the maximum protection to the unborn while at the same time ensuring that women in pregnancy who are suffering from certain life-threatening medical conditions receive all necessary medical treatment.

Press Release, Department of Health and Children, Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001, Key Questions, at <http://www.doh.ie/publications/propkeyq.html> (last visited Oct. 14, 2002) (emphasis added). See also, Legislative History of Protection of Human Life in Pregnancy Bill, 2001, Oct. 2001, available at <http://www.feargalquinn.ie/2001/bills/25.htm>. On March 7, 2002, the Amendment was defeated “by just 10,500 votes in a ballot which displayed a clear divide between urban and rural areas.” *Irish PM Concedes Abortion Defeat*, BBC News, Mar. 7, 2002, available at <http://news.bbc.co.uk/1/low/world/europe/1859287.stm>.