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Limiting "Public Morality" Exceptions to Free Movement in Europe: Ireland's Role in a Changing European Union

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LIMITING "PUBLIC MORALITY" EXCEPTIONS TO FREE MOVEMENT IN EUROPE: IRELAND'S ROLE IN A CHANGING EUROPEAN UNION

"A state without the means of some change is without the means of conservation."
- Edmund Burke

I. INTRODUCTION

Ireland's membership in the European Union (EU) has been a boon to the nation, yet membership has its concessions. In Ireland, and indeed in all Member States, the tensions between domestic law and EU-wide law have been hotly debated, as far back as the inception of the Community in 1944.[1] What began from the wreckage of post-war western Europe as an economic alliance for survival has become a thriving, if bureaucratic,[2] fifteen-member political union on a scale rivaling the

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1. The founding of the European Economic Community began formally with three treaties in the 1950s. *See* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC TREATY]; TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC TREATY]; TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter EURATOM TREATY]. However, these treaties often overshadow the real founding of the movement toward European cooperation, which began with the Benelux countries (Belgium, the Netherlands, and Luxembourg) as governments in exile in London during World War II. These three nations agreed on a post-war plan for further integration, beginning with the establishment of a customs union. *See* John P. Flaherty & Maureen E. Lally-Green, *The European Union: Where Is It Now?*, 34 DUQ. L. REV. 923, 926 (1996). This early attempt at a customs union in Europe, combined with the United States' Marshall Plan for the economic reconstruction of the European landscape, planted the early seeds that brought forth the EEC Treaty, the ECSC Treaty, and the Euratom Treaty. For an in-depth discussion of the early interaction among these three countries, and the effects of the Marshall Plan in Europe, see D. LASOK & K.P.E. LASOK, LAW AND INSTITUTIONS OF THE EUROPEAN UNION 6-10 (6th ed. 1994); WALTER LIPGENS, A HISTORY OF EUROPEAN INTEGRATION 1945-1947, at 488-569 (P.S. Fall & A.J. Ryder trans., Oxford Univ. Press 1982) (1977).

2. European bureaucracy is a thing of legend—it is caused mainly by the requirement that all official documents be published in every official language of the EU. *See* LASOK & LASOK, *supra* note 1, at 249. There are currently eleven official languages in the EU: Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, and Swedish, with the Irish language considered a semi-official language. *See* EUR. CT. JUSTICE R.P. arts. 29, 68. However, this num-

nascent United States.[3] Increasingly, this economic and political union has asserted its influence over social policies in the Member States, and this sway is disproportionately felt in the smaller, poorer Member States of the EU.

Ireland, as one of the poorest nations in the EU,[4] is at odds with its own past. While it appreciates and could hardly subsist without the economic benefits bestowed upon it by virtue of its membership in the EU,[5] the concomitant social tide of change brought from increased contact with the continent has fundamentally and permanently changed the historical conservatism and Catholicism of Ireland. This unexpected side-effect of an international agreement was likely overlooked by Ireland in 1973[6] as it vied for economic stability in an increasingly competitive global market. Despite Ireland's attempts to limit the social side-effects of EU membership,[7] Ireland has failed to maintain complete sovereignty. Yet this is the necessary result, as this Note proposes, in light of the global economy that has developed since Ireland joined the European Economic Community in 1973.[8] To compete in the

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ber is expected to rise in the coming years, as former Soviet bloc countries join the EU. *See Estonia, Latvia and Lithuania Initial Europe Agreements with EU*, EC UPDATE, Apr. 27, 1995, at 10.

3. The fifteen Member States of the European Union are: Austria, Belgium, Britain, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and Sweden. *See* JAMES D. DINNAGE & JOHN F. MURPHY, THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION 9 (1996).

4. *See* Radek Sikorski, *The New Shape of Europe*, NAT'L REV., Dec. 27, 1993, at 26, 27. Spain, Portugal, and Greece are also frequently named as the poorest nations in the EU. *See* David Gow, *Germany and France Back Widening EC*, GUARDIAN, Dec. 5, 1992, at 13; Sikorski, *supra*, at 27; Murray Ritchie, *EC Funds Won by Blarney to be Shared by Jingle Jangle*, HERALD (Glasgow), July 12, 1993, at 18. Boosting the economies of the poorer Member States is one of the fundamental tenets of the EU. The EU is obligated under the Treaty Establishing the European Community to ensure the harmonious economic development of the Member States as a whole by "reducing the differences existing between the various regions and the backwardness of the less favoured regions . . . ." TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, preamble, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY].

5. *See* Ritchie, *supra* note 4, at 18 ("[W]ithout the EC, Ireland's economy would have been washed down the [river] Liffey years ago.").

6. Along with Britain and Denmark, Ireland joined the European Community in 1973. *See* GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 11 (1993).

7. *See infra* notes 26-30 and accompanying text.

8. *See* Renato Ruggiero, *The State of World Trade, Trade Policy and the WTO*, WTO FOCUS, Dec. 1996, at 4. The global economy has become highly com-

global market, Ireland must submit to the continuing centralization, and indeed federalization, of Europe.

As one method of encouraging the continued federalization of the EU, this Note proposes that the European Commission advance legislation requiring Member States to harmonize the way in which they determine public morality exceptions to free trade.[9] Clear rules concerning public morality will solidify the gains made in recent years by promoting an ever closer Union, and will insure that countries like Ireland cohere to the demands of the Union.

Part II of this Note traces Ireland's steps to membership in the European Community, and illustrates how the EU has gradually centralized and placed barriers on Member States' autonomy. It examines indirect European attempts to thwart religious-driven, Irish domestic methods of restricting individual rights granted by every other EU Member State, including the right to divorce and remarry, and the right to early termination of pregnancy in certain situations. To this end, Part II discusses the history of the synergy between church and state in Ireland, and the significant breakdown of that relationship due in part to Ireland's membership in the EU.

Part III begins with a general discussion of European efforts to harmonize many of the laws and trading policies of the Member States, followed by an assessment of judicial interpretations of public morality exceptions to free trade, and the potential to harmonize these exceptions. It proposes that in the interest of continued integration, the EU should solidify the cohesive gains made through its restrictions on Ireland, as de-

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petitive in the last 25 years, and some commentators claim that Europe is falling behind other trading blocs, particularly the North American Free Trade Agreement countries (currently Canada, Mexico, and the United States) and the trading partners in the Pacific Rim. *See, e.g.*, Terence Roth, *Gordian Knot: To Achieve Real Competitiveness, the EU Will First Have to Win Concessions from its Most Comfortable Citizens*, ASIAN WALL ST. J., Oct. 3, 1994, at A1.

9. Free trade among Member States is a requirement under the EU framework as one method of approximating Member State laws. Articles 30-34 of the EC Treaty prohibit quotas, or quantitative restrictions, among Member States. EC TREATY arts. 30-34. Article 32 goes further by requiring Member States to refrain from imposing measures having the "equivalent effect" of a quota. *Id.* art. 32, para. 1. However, article 36 currently provides that articles 30-34 "shall not preclude prohibitions or restrictions on imports, exports or goods in transit" that are justified, inter alia, on grounds of public morality. *Id.* art. 36. This exception to free trade, though, has been somewhat narrowly interpreted. *See infra* Part III.B.

lineated in Part II.

Part IV continues with the proposal that one of the best means of solidifying these gains would be through a Council-adopted Public Morality directive,[10] calling for a Community-wide concept of the boundaries of public morality. In this way, the EU can identify the limits of the sovereign concessions granted to Member States, including Ireland. Additionally, the directive would dramatically improve (and some might argue create) the Community conscience. This directive would help to push the Community past a period in which it vacillates between an impotent bloc of trading partners and a closer, more federalized Union.

II. THE PRESSURE TO CHANGE IN IRELAND: EUROPEAN LIMITS TO THE EXTRATERRITORIALITY OF IRELAND'S MORALITY LAWS

The small island of Ireland has seen extraordinary change in this twentieth century. Sporadically through the first two decades, uprisings at times large, at times small, attempted to free the country from centuries of British control.[11] Finally, in 1921, after several years of intensified clashes between the British Army and Irish forces, Britain capitulated, and agreed to grant independence to a provisional, independent Irish government.[12] However, the new government, fearing a lack of

10. Procedurally, a directive is drafted by the European Commission, which then passes the proposed directive to the Council. The Council, if it agrees with the proposal, then issues the directive to all Member States, on whom the directive is binding. *See* RALPH H. FOLSOM, EUROPEAN UNION LAW 38-39 (2d ed. 1995). Directives are distinguishable from regulations passed by the Council. Regulations are directly effective on Member States, and therefore require no implementation procedures by the Member States. *See id.* at 87. In contrast, directives leave to the Member States the power to implement the directive by whatever means the Member States choose. *See id.* at 37. In addition, Member States are given a grace period in which to adopt the directive. *See* EC TREATY art. 189, paras. 2-3; *see also* BERMANN ET AL., *supra* note 6, at 166-67. For an example of a typical grace period, see Council Directive 64/221/EEC, art. 10, 1963-1964 O.J. SPEC. ED. 117, 119, which states that Member States "shall within six months of notification of this Directive put into force the measures necessary to comply with its provisions and shall forthwith inform the [European] Commission thereof." *Id.* This directive is more fully discussed in Part III.C of this Note.

11. Official British occupation began with the Norman invasion of Ireland in 1169, led by Strongbow, Earl of Pembroke. For an account of this epoch, see EOIN MACNEILL, PHASES OF IRISH HISTORY 300-22 (1920); Katharine Simms, *The Norman Invasion and the Gaelic Recovery*, *in* OXFORD ILLUSTRATED HISTORY OF IRELAND 53, 54-57 (R.F. Foster ed., 1989).

12. *See* R.F. FOSTER, MODERN IRELAND 1600-1972, at 502-03 (Penguin Books

trading partners if ties with Britain were completely severed, agreed to remain a member of the British Commonwealth "for 'purposes of common concern.'"[13] This economic rationale for continued social and political association with Britain lasted until 1949, when Ireland officially became a Republic with full autonomy.[14]

During the period of 1921-1949, the overwhelmingly Roman Catholic nation firmly embraced the synergy of its religion and politics.[15] The Irish Constitution, passed in 1937 and still in effect today, is laden with formal allegiances to all things Catholic. Religion was supreme in this era—the strict morality of the Church played an everyday role in both the political makeup of the country and the social morés of its people.[16] The vestiges of this high period of Roman Catholic political influence are still evident, if waning, in Ireland today.[17]

Despite the cohesive effects of social and religious autonomy in Ireland, political and economic autonomy proved difficult, and in 1973, less than twenty-five years after full independence, Ireland once again began seeking dependence (or at least interdependence) by accepting membership in the European Community[18] (EC).[19] This rapidly advancing communi-

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1989) (1988). This agreement created a sharp division in the Irish forces. Certain concessions had to be made to Britain in order to strike the accord, the most important of which was an oath of fidelity to Britain, and the continued British occupation of six counties in the north of Ireland. *See id.* at 505-06. The resultant break in Irish ranks led to civil war in Ireland from 1921-1923, and in fundamental ways planted the seeds of the current troubles in Northern Ireland. For a thorough discussion of the nascent Irish Free State, see generally JOSEPH M. CURRAN, THE BIRTH OF THE IRISH FREE STATE 1921-23 (1980).

13. David Fitzpatrick, *Ireland Since 1870*, *in* OXFORD ILLUSTRATED HISTORY OF IRELAND, *supra* note 11, at 213, 251.

14. *See* FOSTER, *supra* note 12, at 566. Even this declaration of full separation was tempered by continued trade preference agreements with Britain. *See id.*

15. *See id.* at 520, 534.

16. During this period, the Catholic Church brought forth its full weight of morality on the public, establishing, with official government sanction, social programs for "Catholic Action," which were enforced by Catholic lay organizations such as the Knights of St. Columbanus and the Legion of Mary. Any group or activity which violated the "public morality" was hounded. *See* Fitzpatrick, *supra* note 13, at 264-65.

17. *See infra* Part II.C.

18. *See* IR. CONST. art. 29.4.3. This article of the Irish Constitution, inserted in 1972, provides that "[n]o provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law

ty, now known as the EU following the adoption of the Treaty on European Union (TEU)[20] at Maastricht, Netherlands in 1992, has brought fundamental change to Ireland. Obligations under this treaty have forced changes unimaginable during the high period of Church dominance. The examination of this transformation begins with an analysis of the challenges to Irish sovereignty brought by court decisions concerning a divisive issue in public morality: Abortion.

A. Tensions Between Ireland and the European Union: Abortion Decisions Challenge Irish Sovereignty

Ireland retains the strictest criminal laws in Europe against abortion.[21] Even in cases of rape or incest, a woman may not legally obtain an abortion in Ireland. More starkly, even a pregnant woman with ovarian cancer is compelled to carry her child to term.[22] No other Member State has retained such a restrictive anti-abortion law. The most conservative of these countries at the very least grant women the right of access to an abortion when the life of the mother is threatened.[23]

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in the State." *Id.*; *see* J.M. KELLY, THE IRISH CONSTITUTION 187-89 (2d ed. 1984).

19. To avoid confusion, this Note uses the term "EC" to refer to the Community and its Member States prior to the signing of the Treaty on European Union at Maastricht, Netherlands in 1992. The term "EU" is used to refer to the Community and its Member States after this date.

20. TREATY ON EUROPEAN UNION, Feb. 7, 1992, tit. I, art. A, para. 1, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 719 (1992) [hereinafter TREATY ON EUROPEAN UNION].

21. *See* David Cole, *"Going to England": Irish Abortion Law and the European Community*, 17 HASTINGS INT'L & COMP. L. REV. 113, 114 (1993). This is true despite a recent decision by the Irish Supreme Court that liberalizes access to information about women's health services abroad. *See infra* notes 62-65 and accompanying text.

22. *See* Kevin Myers, *An Irishman's Diary*, IRISH TIMES, Jan. 16, 1996, at 13.

23. In Belgium, abortions are legal only in cases of rape or incest, or when the life of the mother would be endangered if the pregnancy were carried to term. *See* Cole, *supra* note 21, at 114 n.6; Denis Staunton, *Catholic Bishops Face Split over Response to New Abortion Law*, IRISH TIMES, Sept. 26, 1995, at 9. Germany also has fairly strict laws concerning abortion. In 1995, following several years of attempts to integrate the conflicting abortion laws of former East and West Germany, the penal code of Germany was altered to criminalize abortion. *See* Schwangeren-und Familienhilfeänderungsgesetz [Amending Law Regarding Aid to Pregnant Women and Families] of June 29, 1995, BR-Drs. 390/95 (amending § 218 para. 1 Strafgesetzbuch [StGB]). Currently, all abortions in Germany are illegal, as in Ireland, but pregnancies terminated within the first three months go unpunished. *See* § 218a para. 1 StGB. *See generally* Detlev W. Belling & Christina

The criminalization of abortion in Ireland dates back to pre-independence.[24] Statutes provided maximum penalties of life imprisonment for both the provider and the recipient.[25] However, in 1983, only ten years after joining the EC, and fearing the liberalization of abortion laws in other member nations, Ireland amended its constitution by codifying the Roman Catholic viewpoint that a fetus is entitled to the right to life.[26] The amendment was inserted into article 40 of the Irish Constitution, and is referred to as article 40.3.3.[27]

More recently, the Irish government attempted to assure its sovereignty by obtaining a reservation to the TEU in 1992. The Irish Protocol,[28] an attached protocol to both the TEU and the three original treaties establishing the Economic Community,[29] stipulates that nothing in the TEU should be construed as to "affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland."[30]

Despite Ireland's attempts to domesticize its stance on abortion, recent decisions by the Court of Justice of the European Communities (ECJ or European Court of Justice) and the European Court of Human Rights have limited the sovereignty of Ireland in this area.[31] In a blow to Ireland's deeply reli-

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Eberl, *Teenage Abortion in Germany: With Reference to the Legal System in the United States*, 12 J. CONTEMP. HEALTH L. & POL'Y 475, 477-85 (1996). Like Belgium, Germany also permits abortions if necessary to avoid serious physical or mental impairment to the pregnant woman. *See id.* at 479.

24. Termination of pregnancy in Ireland was initially a common-law offense. *See* Attorney Gen. *ex rel.* Soc'y for the Protection of Unborn Children Ir. Ltd. v. Open Door Counselling Ltd., 1987 I.L.R.M. 477, 479. The earliest criminal statute prohibiting abortion was enacted in England in 1803. *See* 43 Geo. 3, ch. 58; *see also* Case C-159/90, Society for the Protection of Unborn Children Ir. Ltd. v. Grogan, 1991 E.C.R. I-4685, I-4686, [1991] 3 C.M.L.R. 849, 854 (discussing the origins of abortion laws in Ireland). A subsequent English statute criminalizing abortion extended its jurisdiction to Ireland. *See* Offences Against the Person Act, 1861, 24 & 25 Vict., ch. 100, §§ 58-59.

25. *See* BRIAN DOOLAN, PRINCIPLES OF IRISH LAW 144 (3d ed. 1991); JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 313 n.10 (1987).

26. *See* IR. CONST. art. 40.3.3. The full text of the amendment 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." *Id.*

27. *Id.*

28. Protocol Annexed to the Treaty on European Union and to the Treaties Establishing the European Communities, 1992 O.J. (C 224) 130 [hereinafter Irish Protocol].

29. *See* treaties cited *supra* note 1.

30. Irish Protocol, *supra* note 28, 1992 O.J. (C 224) at 130.

31. *See* Case C-159/90, Society for the Protection of Unborn Children Ir. Ltd.

gious and moralistic condemnation of abortion, the ECJ concluded, in *Society for the Protection of Unborn Children Ireland Ltd. v. Grogan*, that women in Ireland have the right to travel abroad to receive services legally performed in other Member States, including abortions.[32] The ECJ justified its decision through article 60 of the European Community Treaty (EC Treaty or Treaty), which sets out the guidelines for "services" in the Community.[33] "Services," the court held, include the medical termination of a pregnancy, if performed in accordance with the law of the Member State in which it is carried out.[34] Since an abortion is a procedure carried out by a member of the medical profession, and since the abortion in the *Grogan* case was legally performed in England (another Member State of the Community), Ireland could not prevent the service from

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v. Grogan, 1991 E.C.R. I-4685, [1991] 3 C.M.L.R. 849; Open Door v. Ireland, 246-A Eur. Ct. H.R. (ser. A) (1992) (overly broad injunctions preventing access to abortion information not necessary in a democratic society to protect morals); *cf.* Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) at 19 (1988) (Ireland's criminal prohibition of same-sex conduct between consenting adults in private not necessary in a democratic society to protect morals).

32. *Grogan*, 1991 E.C.R. at I-4742, [1991] 3 C.M.L.R. at 893. Prior to the ECJ's decision, the Irish Supreme Court had attacked the Irish High Court for even making a referral to the ECJ regarding abortion. Prohibitions on abortions in Ireland, as the Supreme Court viewed them, were nonjusticiable by tribunals other than the domestic courts of Ireland. *See* Society for the Protection of Unborn Children Ir. Ltd. v. Grogan, 1989 I.R. 760, 765 (Ir. S.C.). While the Supreme Court could not reverse the High Court's decision to make the referral, it made clear its view that "where the right sought to be protected is that of a life, there can be no question of a possible or putative right which might exist in European law as a corollary to the right to travel so as to avail of services." *Id.* As an aside, there can be no question that the Irish Supreme Court failed to look to international law for guidance on this point. The International Covenant on Civil and Political Rights, to which Ireland is a signatory, specifically requires that "[e]veryone shall be free to leave any country, including his own." International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 12(2), SEN. EXEC. DOC. E, 95-2, at 23, 27 (1978), 999 U.N.T.S. 171, 176 (entered into force Mar. 23, 1976).

33. Article 60 provides:

> Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.
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> "Services" shall in particular include:
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> (a) activities of an industrial character;
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> (b) activities of a commercial character;
>
> (c) activities of craftsmen;
>
> (d) *activities of the professions.*

EC TREATY art. 60, paras. 1-2 (emphasis added).

34. *See Grogan*, 1991 E.C.R. at I-4739, [1991] 3 C.M.L.R. at 890-91.

being performed. The ECJ noted:

> [T]ermination of pregnancy, as lawfully practised in several Member States, is a medical activity which is normally provided for remuneration and may be carried out as part of a professional activity. . . .
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> . . .
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> Consequently, . . . medical termination of pregnancy, performed in accordance with the law of the state in which it is carried out, constitutes a service within the meaning of Article 60 of the Treaty.[35]

In this way, the ECJ, by using an article of the Treaty, could skirt the moral implications of its decision. This antiseptic approach to a divisive issue, not only in Ireland but throughout the world, allowed the court to use an economic rationale[36] for what was essentially a social and moral decision.[37]

Some commentators argue that with the ECJ's decision in *Grogan*, Ireland's continuing prohibition of abortion is merely symbolic.[38] While this argument is likely valid, a clearer impact of the case is the underlying acceptance of the EU's ability to legally encroach upon the domestic affairs of Member States. The court's legal analysis in *Grogan* uses Community

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35. *Id.*

36. The ECJ reasoned that the termination of a pregnancy is a protected economic right. *See id.* at I-4700 (Report for the Hearing) (section not reprinted in C.M.L.R.). The court found precedent for this approach in its prior decision in *Luisi v. Ministero del Tesoro*. In that case, the court addressed an Italian law that limited the amount of foreign currency that could be removed from Italy to another country. In striking down the law as inconsistent with the EC Treaty, the ECJ held that articles 59 and 60 protected the freedom both to receive services and to travel to another Member State to receive services. *See* Joined Cases 286/82 & 26/83, Luisi v. Ministero del Tesoro, 1984 E.C.R. 377, 403, [1985] 3 C.M.L.R. 52, 78.

37. The ECJ dismissed the plaintiff's claims that because of its "gross immorality" abortion should not be viewed as a service. "Whatever the merits of [the plaintiff's] arguments on the moral plane, they cannot influence our [decision]. It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally." *Grogan*, 1991 E.C.R. at I-4739, [1991] 3 C.M.L.R. at 890; *see* Anne M. Hilbert, Note, *The Irish Abortion Debate: Substantive Rights and Affecting Commerce Jurisprudential Models*, 26 VAND. J. TRANSNAT'L L. 1117, 1147 (1994) (asserting that the ECJ's approach to the case was from the standpoint of the EC's goal of uninhibited commerce. This approach, Hilbert notes, is in contravention of previous decisions of Irish courts in the same case, which had used substantive rights analyses to protect the unborn).

38. *See* Cole, *supra* note 21, at 117.

law to supersede the criminal laws of Ireland, and serves to centralize power in the Community.[39] This European power centralization has been recognized in Ireland, as one commentator notes:

> Sovereign parliaments and sovereign courts do not like to admit the limit of their writ is shrinking. Once, what the Dáil[40] ruled upon could then be the legitimate area of scrutiny by our courts. But we know there are other courts to rule over our courts—and more to the point, there are simply the practices of the broader political and moral culture to which we have appended ourselves.[41]

The recognition of this fact, and its implicit acceptance, brings Europe one step closer to federalism.[42]

At the same time, putting aside the question of whether the ECJ's decision in *Grogan* was legally sound in a jurisprudential sense, one must look at the jurisdictional question raised by the court's intrusion into the criminal laws of a Member State, an area of law traditionally reserved to Member States.

The court's jurisdiction played a central role in another criminal case that reached the ECJ, having originated in the domestic courts of Germany.[43] The case, *Criminal Proceedings*

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39. Many people in Ireland do not view this power centralization as an awful notion. Indeed, vocal sentiment has been sounded to scrap completely the current Irish Constitution and start anew, by creating a constitution unimaginable in 1937—a constitution that explicitly recognizes the supranational nature of Ireland's association with the EU. *See, e.g.*, Sean Marlow, *Constitutional Crusade Needed*, AN POBHLACHT (visited Jan. 27, 1997) <http://www.utexas.edu/students/iig/archive/aprn/95/August17/lett.html> (advocating a complete revision of the 1937 constitution).

40. The Dáil is the Irish Parliament. *See infra* note 71.

41. Kevin Myers, *An Irishman's Diary*, IRISH TIMES, May 5, 1995, at 15.

42. *See* DINNAGE & MURPHY, *supra* note 3, at xix. The supremacy of Community law over national law is not set forth in the EC Treaty itself. Rather, the ECJ established early on a doctrine upholding the primacy of Community law. In a 1964 case, the ECJ held that a provision of Community law must of necessity prevail over a conflicting provision in the national law of any Member State. *See* Case 6/64, Costa v. Ente Nazionale per L'Energia Elettrica (ENEL) [National Electric Board], 1964 E.C.R. 585, 593-95, 1964 C.M.L.R. 425, 455-56. The importance of this judicially created supremacy doctrine cannot be underestimated; without it, the Community never would have advanced to its current state of integration, and its absence would have placed the potential for a federalized EU beyond reach.

43. Domestic courts of the Member States often find occasion to refer matters to the ECJ for preliminary rulings. Under article 177 of the EC Treaty, any "court

Against Casati,[44] reveals the growing but indirect centralization spurred on by harmonization goals as contemplated in the EC Treaty.[45] The defendant, Guerrino Casati, was charged with violating German border monetary declaration rules.[46] Although the case centered directly on criminal law, the ECJ utilized a harmonization argument in striking down the law. The court stated:

> In principle, criminal legislation and the rules of criminal procedure are matters for which Member States are still responsible. However, it is clear from a consistent line of cases decided by the Court, that Community law also sets certain limits in that area as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons. The administrative measures or penalties must not go beyond what is strictly necessary, the control procedures must not be conceived in such a way as to restrict the freedom required by the Treaty and they must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom.[47]

In its response to the German court's inquiry, the ECJ correctly validated jurisdictional intrusion into domestic law for purposes of solidifying the impact of the Treaty. Specifically, the court seemed to be asserting that the exceptions to the free flow of goods, persons, and (presumably) services, permitted by

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or tribunal" of a Member State is permitted to request a ruling from the ECJ if, inter alia, the court or tribunal believes that an interpretation of the EC Treaty is necessary to render judgment. *See* EC TREATY art. 177, paras. 1(a), 2. In addition, the highest court or tribunal of a Member State must bring an issue before the ECJ if a case requires interpretation of the Treaty and there is no judicial remedy under national law. *See id.* art. 177, para. 3. *See generally* Alexander John MacKenzie Stuart, *The Court of Justice of the European Communities: The Scope of its Jurisdiction and the Evolution of its Case Law Under the EEC Treaty*, 3 NW. J. INT'L L. & BUS. 415 (1981).

44. Case 203/80, Criminal Proceedings Against Casati, 1981 E.C.R. 2595, [1982] 1 C.M.L.R. 365.

45. *See* EC TREATY art. 100 (as amended 1992) ("The Council shall . . . issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.").

46. *See Casati*, 1981 E.C.R. at 2598, [1982] 1 C.M.L.R. at 371-72.

47. *Id.* at 2618, [1982] 1 C.M.L.R. at 396.

various articles of the EC Treaty,[48] must comply with the principle of proportionality.[49]

Proportionality is a general principle of international law.[50] In the context of free trade, and in order to achieve the objectives set out in the treaties, the principle of proportionality requires Member States invoking these exceptions, as a justification for impeding the free flow of goods, do so only to the extent to which it is justified.[51] Under the ECJ's interpretation, a measure is justified if it is "necessary, and no more than is necessary," to achieve the desired result.[52] Furthermore, no measure can be justified as necessary merely because it is beneficial to the Member State, or is simply a measure that is designed primarily to reduce public expenditures or lighten administrative burdens.[53]

It is unfortunate that the ECJ, in its assessment of the *Grogan* case, was unable to recall the proportionality dictum in *Casati*, and use it to validate further its jurisdictional right to tinker with the criminal laws of Ireland involving abortion. Had the court been able to use this dictum, it could have established a minimum level of rights for women's access to abortions, to which Ireland could certainly add, but which it could not take away.

However, the court was unable to do so. Because of the Irish Protocol,[54] no EU law may impede the efforts of the Irish government to protect fetal rights (or to subvert women's rights, depending on one's point of view). However, despite this inability, the EU has arguably eviscerated much of the meaning of the Protocol, with a declaration of the High Contracting Parties adopted after Ireland had signed the TEU, but

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48. Limiting free trade based on public morality objections is currently one method. *See supra* note 9.

49. *See* John Temple Lang, *The Sphere in Which Member States Are Obliged to Comply with the General Principles of Law and Community Fundamental Rights Principles*, 2 LEGAL ISSUES EUR. INTEGRATION 23, 27 (1991).

50. *See id.* at 23 n.1.

51. *See* Case 153/78, Commission v. Federal Republic of Germany (*Re* Health Control on Imported Meat), 1979 E.C.R. 2555, 2564, [1980] 1 C.M.L.R. 198, 207 (1979); JOSEPHINE STEINER, TEXTBOOK ON EC LAW 109 (4th ed. 1994).

52. STEINER, *supra* note 51, at 109.

53. *See id.*; *see also* Case 104/75, Officier Van Justitie v. De Peijper, 1976 E.C.R. 613, 636, [1976] 2 C.M.L.R. 271, 304 (utilizing similar language to limit Member State justifications).

54. *See supra* notes 28-30 and accompanying text.

prior to its entry into force. The Declaration states:

> The High Contracting Parties to the Treaty on European Union[,] . . . [h]aving considered the terms of [the Irish Protocol] . . . [h]ereby 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 Ireland information relating to services lawfully available in Member States*.[55]

These measures by the European Union to date have been somewhat effective in defining the boundaries of Ireland's sovereignty, but the efforts of the EU have been complemented by fundamental legal shifts within Ireland itself. These shifts are discussed in the following section.

B. Changes from Within: The Right of Access to Abortion Information Abroad

Not all of the changes in Irish society have been forced upon it by an intrusive supranational governing body on the Continent. Irish citizens have created changes at home. For example, to cement the effects of the litigation in *Grogan*, the Irish electorate passed by a wide margin the fourteenth amendment to the Constitution, protecting a woman's right to information about abortion services in other EU states.[56] This was a clear victory for women's rights advocates, and a reaffirmation that Irish citizens felt inclined to liberalize further Irish law.[57] In addition, the vote underscored the slippery

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55. Declaration of the High Contracting Parties to the Treaty on European Union, *adopted at* Gumarães (Port.), May 1, 1992, *reprinted in* 1 EUROPEAN UNION: SELECTED INSTRUMENTS TAKEN FROM THE TREATIES 67 (1993) (emphasis added).

56. *See* Geraldine Kennedy, *Amendment on Abortion Defeated by 2-1 Majority*, IRISH TIMES, Nov. 28, 1992, at 1 (reporting that although a referendum to legalize abortion failed, the Irish electorate widely embraced a measure to ensure access to information about women's health services abroad); Carol Coulter, *Pro-Life Campaign to Lobby Politicians Against Bill*, IRISH TIMES, Feb. 25, 1995, at 4.

57. The extent of the liberalization, however, should not be exaggerated. An amendment failed that same year, which would have legalized abortions in Ireland when the life of the mother was in danger, or in cases of rape or incest. *See* Kennedy, *supra* note 56, at 1. Note however, that this referendum took place prior to ratification of the TEU.

hold the Church has in Ireland; its rigorous campaign from the pulpit against the referendum met with defeat.

The wording of the amendment left little doubt about the new direction in Ireland. It provided that article 40.3.3[58] "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."[59] This paved the way for the Irish legislature constitutionally to enact legislation protecting the right of a woman to receive information on abortions abroad.

The momentum to solidify this right culminated in May 1995 with the Regulation of Information Bill (Information Bill or Bill).[60] The Information Bill codified into legislation the wording of the fourteenth amendment. However, the Bill required that the information must not "advocate or promote . . . the termination of pregnancy."[61] Despite this dilution, the Bill was challenged by fetal rights advocates, who overlooked the democratic notions of unity by consent and contested the Bill on constitutional grounds. The historically conservative Supreme Court seemed certain to strike down the Bill as an unconstitutional violation of natural law, a view the court had repeatedly espoused.

Surprisingly, the Supreme Court of Ireland upheld the validity of the Bill,[62] in what is widely viewed as one of the most important opinions handed down by an Irish court in the modern era.[63] In its opinion, the court rejected the traditional natural law theory which had legitimated its conservative,

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58. *See supra* note 26-27 and accompanying text.

59. IR. CONST. amend. XIV.

60. Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill, No. 108 (1995) (Ir.) [hereinafter Information Bill] (codified as Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, No. 5 (1995) [hereinafter Information Act]); *see* Kristin E. Carder, Note, *Liberalizing Abortion in Ireland: In re* Article 26 *and the Passage of the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill*, 3 TULSA J. COMP. & INT'L L. 253 (1996).

61. Information Bill, *supra* note 60, § 3(1)(a)(v)(II) (codified as Information Act, *supra* note 60, § 3(iv)).

62. *See In re* Article 26 of the Constitution and *in re* the Reference to the Court of the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill, [1995] 2 I.L.R.M. 81, 115-16 (Ir. S.C.) [hereinafter *In re* Article 26].

63. *See, e.g.*, William Binchy, *Abortion Ruling One of the Most Significant Legal Decisions Since the Foundation of State*, IRISH TIMES, May 15, 1995, at 12.

religion-based opinions in the past.[64] It stressed:

> The fourteenth amendment to the Constitution [cannot] be disregarded on the ground that it [is] inconsistent with natural law. It is permissible for the people to exercise the power to amend the Constitution provided for in Article 46 in a manner which [is] inconsistent with natural law. Natural law is not antecedent and superior to the Constitution. . . . The Constitution, as amended by the fourteenth amendment, constitute[s] the fundamental and supreme law of the State.[65]

This notion of "natural law" had previously been used by the Irish Courts to strike down attempts to liberalize or secularize areas of the Irish Constitution. Natural law typically translated into "canonical law," and legislative proposals which ran contrary to Catholic doctrine were consistently found to be repugnant to the Constitution.[66]

In its abandonment of natural law,[67] it could very well be

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64. *See In re* Article 26, [1995] 2 I.L.R.M. at 83. For an example of this conservative, moralistic approach of the past, see *Attorney Gen. ex rel. Soc'y for the Protection of Unborn Children Ir. Ltd. v. Open Door Counselling Ltd.*, 1988 I.R. 593 (Ir. H. Ct.), in which the High Court of Ireland invoked natural law in its refusal to allow a family planning clinic to alert Irish women to the legality and availability of abortion services abroad. *Id.* at 614. The Information Bill was largely a reaction to the hostility shown by the Supreme Court to any liberalization of women's access to family planning information, which makes the court's about-face decision in *In re Article 26* all the more important.

65. *In re Article 26*, [1995] 2 I.L.R.M. at 83; *see id.* at 107-08.

66. *See* Paul W. Butler & David L. Gregory, *A Not So Distant Mirror: Federalism and the Role of Natural Law in the United States, the Republic of Ireland, and the European Community*, 25 VAND. J. TRANSNAT'L L. 429, 444-45 (1992). Butler and Gregory argue that the Irish judiciary has frequently relied on the jurisprudence of St. Thomas Aquinas in attempting to interpret the Irish Constitution as an embodiment of the principle that the state should be a mechanism of the "higher law" of God. *See id.* at 446. "Under Thomism, a judge should apply judicial reason to derive political truths from the eternal law of God. Natural law is the link between the eternal law and the positive moral law." *Id.*

67. For an equally stunning recent decision by the Irish Supreme Court, by virtue of its abandonment of traditional natural law principles, see *In re* a Ward of Court, [1995] 2 I.L.R.M. 401. The facts of the case are remarkably similar to the United States case of *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), in which the United States Supreme Court rejected the argument that the family of an individual in a vegetative state has a right to terminate the individual's life support systems. In the Irish case, the Irish Supreme Court took the opposite position, and granted the family's request. *See In re* a Ward of Court, [1995] 2 I.L.R.M. at 429-30. This example of the recent liberalization of the Irish court can be viewed as yet another example of the direct impact of judicial

that the court was capitulating to the requirements of the Community.[68] Left to its own authority, the court likely would have relied upon its typical natural law assessment, finding the Bill repugnant to the Constitution because of its violation of natural law. Instead, the Irish Court, perhaps mindful of ECJ decisions in the past, bowed to the will of the people.[69] The court's ruling could well be a sort of appeasement measure to the ECJ and other Member States, and an indication of a future narrow interpretation of the Irish Protocol of Maastricht.[70]

It is important to note that the Information Bill was passed by both Houses of the Oireachtas,[71] and not on the initiation of women's rights advocates.[72] This legislative activism is in stark contrast to traditional notions of harmony between the Irish state and the Church; indeed, the Church vehemently castigated both the legislators for proposing the Bill and the Supreme Court for finding the Bill constitutional.[73] Similar opposition, this time to ending the ban on di-

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interaction with Europe.

68. The ruling by the Irish Supreme Court in May 1995, upholding the constitutionality of the Information Bill was a brave step by the Irish Court, in that it went directly against both the teachings and the urgings of the Catholic Church. Yet, in many ways, its decision may seem somewhat outdated in the not too distant future. New forms of media, particularly computer networks like the Internet, are bringing all sorts of information to Ireland in quantities and speeds that make regulation of the information impossible. *See* Myers, *supra* note 41, at 15. The court may have merely upheld a law that codifies a stern but unenforceable rule, since anyone outside its jurisdiction is free to post with impunity any manner of information about abortion, including information that "advocate[s] or promote[s] . . . the termination of pregnancy." Information Bill, *supra* note 60, § 3(1)(a)(v)(II) (codified as Information Act, *supra* note 60, § 3(iv)). The courts would no doubt have jurisdiction to punish citizens who *access* the information, but problems with this exist. First, it is extremely difficult, given Ireland's impoverished situation, to justify or fund the regulation necessary to apprehend citizens who access the illegal information. Furthermore, the original criminal law banning abortion information in Ireland targeted the information provider, not the recipient of that information. *See In re* Article 26, [1995] 2 I.L.R.M. at 90 (citing Attorney Gen. *ex rel.* Soc'y for the Protection of Unborn Children Ir. Ltd. v. Open Door Counselling Ltd., 1988 I.R. 593 (Ir. H. Ct.)).

69. *See In re* Article 26, [1995] 2 I.L.R.M. at 90-91, 102-03.

70. Irish Protocol, *supra* note 28.

71. *See In re* Article 26, [1995] 2 I.L.R.M. at 90. The Oireachtas is the national parliament of Ireland. Somewhat comparable to the House of Commons and House of Lords in Britain, the Oireachtas is comprised of the Dáil Éireann and the Seanad Éireann. *See* DOOLAN, *supra* note 25, at 13, 17-21.

72. Doubtless, though, women's rights groups lobbied heavily for the Bill.

73. *See* Andy Pollak, *Hierarchy Criticises Supreme Court*, IRISH TIMES, July 1,

vorce, was raised by the Church throughout the fall of 1995, and ended in yet another defeat for the Church.[74]

C. *Ireland and the Roman Catholic Church*

The thread running through this discussion is the waning influence of the Church in Ireland. The erosion began with Ireland's acceptance into the European Community in 1973,[75] and since then the Church's influence has steadily decreased. Arguably, there is only room for one form of supranational law, and, with the increasing influence of European

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1995, at 8.

74. On November 24, 1995, a majority of the citizens of Ireland voted to adopt a government-supported constitutional amendment to end the ban on divorce. *See* James F. Clarity, *Irish Vote to End the Divorce Ban By a Tiny Margin*, N.Y. TIMES, Nov. 26, 1995, at A1. This historic vote signals the further erosion of the synergy between Church and State in Ireland. Indeed, the vote is yet another example of the profound social changes in Ireland as a direct result of Ireland's membership in the more socially liberal European Union—Ireland is the last EU Member State to legalize divorce. *See* Anna Margaret McDonough, Comment, *When Irish Eyes Aren't Smiling—Legalizing Divorce in Ireland*, 14 DICK. J. INT'L L. 647, 647 (1996).

The concept of divorce, while neither a "good" nor a "service" under the EC Treaty, and therefore not directly applicable to the discussion in the main text, is still an important element in the social fabric of Irish and European life. Thus, it is briefly described here.

Divorce in ancient Ireland was oddly more liberal than it is in Ireland today, even after the recent decision to end its prohibition. Brehon law, the ancient doctrine of Irish law, was enforced by the Brehon judges, nomadic arbiters who traveled Ireland. *See* PAUL C. BARTHOLOMEW, THE IRISH JUDICIARY 52 (1971). According to Brehon law, on the first day of every February, either husband or wife could choose to walk away from the marriage. *See* MARY DOWLING DALEY, IRISH LAWS 55 (1989). However, since the introduction of Christianity to Ireland, divorce has been illegal.

Modern divorce laws in Ireland did not follow their liberal British counterparts, despite the lasting influence of English law in Ireland. Rather, the Roman Catholic ban on divorce had been the official law of the state since its inception. *See* McDonough, *supra*, at 649. This ban was codified in article 41.3.2 of the Constitution, which stated: "No law shall be enacted providing for the grant of a dissolution of marriage." IR. CONST. art. 41.3.2 (repealed 1995). This provision is now superseded by the fifteenth amendment, as adopted by the people on November 24, 1995. *Id.* amend. XV. The amendment permits spouses to divorce if they have lived apart for at least four years and there is no prospect of reconciliation. *Id.* Importantly, the Irish Supreme Court recently upheld the constitutionality of the amendment, exhibiting the court's new-found disdain for reliance on natural law. *See In re* the Fifteenth Amendment of the Constitution (No. 2) Bill, [1996] 2 I.L.R.M. 161 (Ir. S.C. June 12, 1996) (LEXIS, Irelnd Library, Cases File). This brings Ireland into line with every other Member State in the EU.

75. *See* FOSTER, *supra* note 12, at 569 & n.1.

law in Ireland, canonical law has been pushed aside.

The unraveling of the Church's influence in Ireland can perhaps be traced to the 1972 repeal of the constitutionally recognized, semi-governmental role of the Church in Ireland. The repealed article recognized "the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens."[76] Although the article's repeal was the result of a combination of factors, the Irish accession to the EC, one year following repeal, was likely an important factor. Politicians at the time were particularly interested in pointing to the compatibility of Ireland's system of government with the EC, mindful, as they were, of the economic windfall that would come with acceptance into the EC.[77]

This is not to say, of course, that Ireland has successfully separated church from state, or indeed wishes to.[78] Nonetheless, repealing the mandate of a role for the Church in the hierarchy of government fundamentally changed the Church's position in the structure of Irish society.[79] Twenty-five years after the repeal, priests in Ireland hold far less sway, having supported and lost several major socially conservative campaigns in the late 1980s and early 1990s.[80] In addition, corruption and scandal within the Church itself has created a backlash against its leaders.[81]

The Church nevertheless continues to wield power in this

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76. IR. CONST. art. 44.1.2 (repealed 1972); *see* FOSTER, *supra* note 12, at 595.

77. *See* Butler & Gregory, *supra* note 66, at 444. Butler and Gregory conclude that despite the judicial skirmishes over abortion between Irish courts and the ECJ, the Irish government "strongly supported approval of the [Treaty on European Union] because the European Community annually provides hundreds of millions of dollars in subsidies to Ireland's devastated economy." *Id.* Arguably, the Irish government reacted similarly when faced with the prospect of EC subsidies in 1973.

78. For instance, the Irish Constitution continues to retain a provision requiring that the State "respect and honour religion." IR. CONST. art. 44.1.

79. *See* Butler & Gregory, *supra* note 66, at 445-46.

80. The Church's failed anti-divorce campaign in 1995 is merely the most recent. *See supra* note 74.

81. The Church has officially recognized the extent of its internal problems. Some of the most damaging and well-known of these problems are the charges of sexual molestation leveled at priests in several parts of the country. In October 1995, meetings between Church officials were held, and a public statement issued, acknowledging the problems within the Church and promising reform. *See* James F. Clarity, *Ireland's Catholic Hierarchy Confronts Sex Abuse of Children*, N.Y. TIMES, Oct. 19, 1995, at A11.

small nation. Indeed, the preamble of the Constitution invokes the "Holy Trinity" and humbly acknowledges the people of Ireland's "obligations to our Divine Lord, Jesus Christ,"[82] and this is often followed in judicial opinions citing to the Constitution.[83]

III. THE PUBLIC MORALITY DOCTRINE IN THE EUROPEAN UNION AND THE PRECEDENT FOR HARMONIOUS APPROACHES TO IT

As Part II illustrates, the EU is capable of a certain amount of intrusion into the domestic affairs of its Member States. However, as the Irish Protocol attests, this power is

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82. The full text of the preamble is telling, in that it invokes the religious fervor of the period in which the Constitution was enacted, in 1937, less than 15 years after the liberation of the Irish state. The preamble reads:

> In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,
>
> We, the people of Éire,
>
> Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,
>
> Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,
>
> And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,
>
> Do hereby adopt, enact, and give to ourselves this Constitution.

IR. CONST. preamble.

83. Most pointedly, the Chief Justice of the Irish Supreme Court proclaimed in 1984:

> The preamble to the Constitution proudly asserts the existence of God in the Most Holy Trinity and recites that the people of Ireland humbly acknowledge their obligation to "our Divine Lord, Jesus Christ." It cannot be doubted that the people . . . were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs.

Norris v. Attorney Gen., 1984 I.R. 36, 64 (Ir. S.C.) (O'Higgins, C.J.) (upholding law prohibiting private, same-sex, consensual conduct), *rev'd*, Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) (1988); *see also* Quinn's Supermarket Ltd. v. Attorney Gen., 1972 I.R. 1, 23 (Ir. S.C.) (Irish Constitution "reflect[s] a firm conviction that we [the Irish] are a religious people"); Attorney Gen. *ex rel.* Soc'y for the Protection of Unborn Children Ir. Ltd. v. Open Door Counselling Ltd., 1988 I.R 593, 614 (Ir. H. Ct.) (quoting *Norris*, 1984 I.R. at 64); Finn v. Attorney Gen., 1983 I.R. 154, 159 (Ir. H. Ct.) (upholding eighth amendment to the Irish Constitution and invoking the preamble); Kennedy v. Ireland, 1987 I.R. 587, 590 (Ir. S.C.) (right to privacy, though not an enumerated constitutional right, is a personal right which flows from the Christian and democratic nature of the nation).

limited, and is often not very potent. This problem is compounded by the often ambiguous wording of the EC Treaty and now the Treaty on European Union. One possible way in which closer Community cohesion can be achieved, thereby negating the need for judicial intrusion, would be to harmonize the way in which Member States approach the issue of public morality. To this end, Part III.A discusses how the Community can require Member States to harmonize their laws. Section B discusses the different interpretations of the phrase "public morality" as used in article 36 of the EC Treaty. Section C examines the manner in which the Community has approached the term "public policy" and shows how the framework for dealing with public policy issues could be used as precedent for a directive on public morality. Section D notes the application of public morality in other areas of the Community in addition to article 36, specifically in the European Patent Convention and, more recently, the Community Patent Convention. Finally, Part IV is devoted to a discussion of the feasibility, and indeed the economic necessity, of a public morality directive.

A. Harmonization as a Method of Limiting Member States' Sovereignty

In its infancy, the task of the Community was embodied in article 2 of the 1957 EEC Treaty.[84] This provision included the Community goal of harmonizing many of the laws of Member States. Specifically, article 2 stated that the objective of the Community was to promote "a harmonious development of economic activities,"[85] in part by "progressively approximating the economic policies of Member States."[86]

Article 2 underwent substantial changes when the TEU was adopted in 1992. Under the TEU, article 2 now requires a far greater commitment by both the EU and the Member States to establish policies which further function to harmonize. Article 2 now states that:

> The Community shall have as its task, by establishing a common market and an economic and monetary union . . . , to promote throughout the Community a harmonious and

84. EEC TREATY art. 2 (as in effect in 1985).
85. *Id.*
86. *Id.*

> balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."[87]

These aims of the Union are reaffirmed in article 3, which requires both the Community and the Member States to adopt an economic policy "based on the close coordination of Member States' economic policies."[88] The effect of this more binding language, while perhaps not its anticipated intent, is to limit the sovereignty of Member States, and to centralize the Union.

Against this backdrop of the codification of social and political cohesion are the harmonization attempts of the past. Increasingly, though at times sporadically, EU laws have been consolidating and harmonizing the laws of Member States, and the EU's deceivingly slow accession of political and social power has led to a state of semi-federalism in Europe.[89] Under article 100 of the revised EC Treaty, the EU may act to direct the Member States to harmonize certain laws in a manner approximating the laws and regulations of the Community.[90]

While much of this harmonization process has focused on streamlining economic and agricultural policy, there is room within the harmonization process to address other areas. A directive offering Member States a guideline by which to determine whether a "good" violates the European Union's standards of public morality is a viable area for further harmonization. However, before discussing the potential harmonizing effects of the directive, an analysis of the judicial interpretation of "public morality" in article 36 is laid out in Section B.

B. Interpretation of Article 36 by the European Court of Justice

The EC Treaty granted certain concessions to Member States, in an attempt to allay fears that their sovereign laws would be superseded by European Council directives and deci-

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87. EC TREATY art. 2.
88. *Id.* art. 3a(1).
89. *See* Gow, *supra* note 4, at 13.
90. EC TREATY art. 100.

sions of the European Court of Justice. Interspersed throughout the treaty are these concessions, one of which allows the Member States to place limits on the otherwise free movement of goods.[91]

Article 36 of the EC Treaty allows Member States to prohibit or restrict imports, exports, or goods in transit if the prohibition or restriction is "justified on grounds of public morality, public policy or public security . . . [or for] the protection of health and life of humans, animals or plants . . . ."[92] However, the treaty cautions that "[s]uch prohibitions or restrictions shall not . . . constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."[93] In interpreting this last sentence, the ECJ has consistently held that article 36 does not constitute a reservation of sovereignty to the Member States.[94] Yet this public morality justification has been invoked by Ireland and other Member States to prevent, in good faith or bad, the free movement of goods, one of the fundamental goals of the treaty.

The first opportunity for the ECJ to focus on the public morality provision of article 36 originated in a referral from an English court in 1979.[95] *Regina v. Henn & Darby*[96] involved an 1876 British customs law which banned the importation of

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91. *See id.* art. 36.

92. *Id.*

93. *Id.*

94. *See* Case 35/76, Simmenthal SpA v. Ministero Delle Finanze [Italian Minister for Finance], 1976 E.C.R. 1871, 1886, [1977] 2 C.M.L.R. 1, 15; Case 5/77, Tedeschi v. Denkavit Commerciale s.r.l., 1977 E.C.R. 1555, 1559, [1978] 1 C.M.L.R. 1, 18 (1977); *see also* Manfred A. Dauses, *The System of the Free Movement of Goods in the European Community*, 33 AM. J. COMP. L. 209, 224 (1985).

95. For a procedural discussion of the relationship between Member State courts and the ECJ, see *supra* note 43.

96. Case 34/79, Regina v. Henn & Darby, 1979 E.C.R. 3795, [1980] 1 C.M.L.R. 246 (1979). Prior to the decision in this case, a written question to the European Commission asked for an interpretation of the public morality clause in 1977. *See* 1977 O.J. (C 265) 8. The question asked whether a Member State which forbade the rearing and slaughtering of animals in a cruel manner could invoke the public morality exception of article 36 to prohibit the importation of meat from Member States which maintained less stringent guidelines on animal slaughter. The Commission ruled that a Member State could *not* prohibit the importation of such meat. It reasoned that "any affront to public morals . . . would occur solely in the country where the cruel treatment takes place and can be witnessed by the local population, and not in the importing country." *Id.*; *see* PETER OLIVER, FREE MOVEMENT OF GOODS IN THE EEC 180 n.78 (2d ed. 1988). To remedy the deplorable conditions of animals, the Commission recommended action on a Community-wide level. 1977 O.J. (C 265) 9.

"indecent or obscene articles."[97] Defendants were charged with violating this customs law for importing pornographic films and magazines featuring child pornography and other acts contrary to the criminal law of Britain.[98] The pornography had originated in Germany, Denmark, and Sweden.[99] On appeal of their conviction to the House of Lords, and subsequently to the ECJ,[100] the defendants argued that article 36 of the EEC Treaty required Britain to have clearly defined rules of public morality.[101] The ECJ upheld Britain's right to maintain the customs law and to convict the defendants for its violation.[102]

In interpreting article 36, the ECJ noted that "[i]n principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory."[103] The court went on to say:

> [I]f a prohibition on the importation of goods is justifiable on grounds of public morality and if it is imposed with that purpose the enforcement of that prohibition cannot, in the absence within the Member State concerned of a lawful trade in the same goods, constitute a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36.[104]

In this often-criticized opinion,[105] the court was over-

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97. Customs Consolidation Act, 1876, 39 & 40 Vict., ch. 36, § 42 (Eng.). The Customs Consolidation Act made it a criminal offense for any person to be in any way knowingly concerned in the fraudulent evasion or attempted evasion of this prohibition on importation. *Id.*

98. *See Henn & Darby*, 1979 E.C.R. at 3798-99, [1980] 1 C.M.L.R. at 249-50. While child pornography justifiably fell within the scope of this law, far less sordid material would have also fallen within the broad definition of this customs law. *See* LAURENCE W. GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC 126 (1985).

99. It is unclear whether the materials were legal in those Member States. *See* Regina v. Henn, [1978] 1 W.L.R. 1031 (Eng. C.A.).

100. For a brief discussion of the procedural aspects of an individual challenge to the ECJ, see *infra* note 119.

101. *See Henn & Darby*, 1979 E.C.R. at 3801 (not reprinted in C.M.L.R.).

102. *See id.* at 3817, [1980] 1 C.M.L.R. at 275-76.

103. *Id.* at 3813, [1980] 1 C.M.L.R. at 272.

104. *Id.* at 3815, [1980] 1 C.M.L.R. at 274.

105. *See, e.g.*, GORMLEY, *supra* note 98, at 128 (criticizing the court's departure from general principles of proportionality, in its failure to consider the

broad, since it grouped the entire concept of "public morality" into the confines of child pornography. The "extreme nature of the materials"[106] involved called for a far narrower holding than the one the court inevitably gave. The court therefore gave an inadequate delineation of the contours of the public morality clause. Because the concept of "public morality" was hitched to such extreme derogations from that concept, future assessments of the morality clause were consequently tied to the facts of *Henn & Darby*. The court instead should have chosen to limit its ruling to the facts of the case, and waited until a more moderate assessment of the public morality clause could be given.

Furthermore, in this assessment, the court conceded extravagant power to each Member State, because the decision essentially undermines the text of article 36. If no check is placed on the extent to which a Member State can arbitrarily invoke the public morality clause based on the Member State's own, often obscure, laws, then the line between bad faith use and good faith use of the clause is blurred, and article 36 is rendered essentially meaningless.[107] Thus, under the *Henn & Darby* line of case law, the free movement of goods may be impeded at the whim of a Member State, in direct contradiction of the Treaty.

Utilizing the *Henn & Darby* rationale, Ireland potentially could invoke the provisions of article 36 in two distinct man-

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disproportionality of the risk avoided by the law and the burden placed on violators of the law); Dauses, *supra* note 94, at 226 (interpreting the *Henn & Darby* decision so narrowly as to be confined to its facts). The opinion has also been criticized for misconstruing the facts—as it happens, England maintained different standards of determining indecency and obscenity, standards which favored English citizens. The Customs Consolidation Act prohibited the importation of both obscene and indecent materials, whereas another English provision prohibited the *sale* of obscene, but not indecent, materials. Thus, English vendors were held to a lower standard, and the discrimination against citizens of other Member States could be construed as a form of "arbitrary discrimination" prohibited under article 36 of the EC Treaty. *See* OLIVER, *supra* note 96, at 182-83.

106. GORMLEY, *supra* note 98, at 128.

107. A similar argument was also raised by Rebecca J. Cook to find fault with some international human rights treaties. She noted that when a treaty lacks compulsory jurisdiction to determine whether a signatory has failed to meet its treaty obligations, the treaty is essentially undermined. *See* Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 172-73 (1994). So too is the EC Treaty undermined if the obligations under article 36 are left to the individual determinations of Member States.

ners. First, the government could use article 36 as an economic measure disguised as a moral objection. For example, as a retaliatory measure against Britain for some other trade dispute, Ireland could ban the sale of all contraceptives manufactured in Britain, claiming that their importation violates public morality. If this were a unilateral measure taken against Britain, but not against other Member States, who were still free to export contraceptives to Ireland, it is fairly clear that the ECJ would find the Irish measure contrary to the spirit of the Treaty.[108] Leaving aside the issue of good faith interpretation of the Treaty, it would be enough for the ECJ to conclude that Ireland had impeded the free movement of goods.[109] However, in a second hypothetical situation, if the same measure were passed in Ireland and applied on a Community-wide basis, such that imports of contraceptives were banned no matter where they originated, under the wording of the ECJ's decision in *Henn & Darby*, Ireland would be legally invoking its sovereign right under article 36, to the detriment of the free movement of goods, and to the detriment of companies in other Member States. Ireland's ability to do so would undermine the goal of the unfettered flow of goods,[110] and indeed the goals of "an ever closer union"[111] and "closer relations between the States belonging to [the European Community]."[112]

Yet the *Henn & Darby* case is not the only ECJ case to focus on public morality and its relation to article 36. The Court of Justice readdressed the public morality issue in *Conegate Ltd. v. Her Majesty's Customs & Excise*.[113] As in *Henn & Darby*, the facts were titillating. British Customs and Excise officers seized an importation of inflatable rubber dolls which were ostensibly crafted as "love dolls."[114] Also seized were various exotic and erotic sexual devices, all of which had been exported from Germany.[115] The goods were seized on the

108. *See Henn & Darby*, 1979 E.C.R. at 3815, [1980] 1 C.M.L.R. at 273-74.

109. Community law mandates the maintenance of the free flow of goods between Member States. *See supra* note 9.

110. *See* EC TREATY art. 30.

111. TREATY ON EUROPEAN UNION preamble, para. 12.

112. EC TREATY art. 2.

113. Case 121/85, Conegate Ltd. v. Her Majesty's Customs & Excise, 1986 E.C.R. 1007, [1986] 1 C.M.L.R. 739.

114. *Id.* at 1008, [1986] 1 C.M.L.R. at 741.

115. *See id.* at 1018, [1986] 1 C.M.L.R. at 750. As in *Henn & Darby*, it is not

grounds that all of them violated British conceptions of public morality, since the goods were determined by British customs officials to be "indecent and obscene" under the same customs law[116] used in *Henn & Darby*.[117] Thus, the British courts asserted that the goods were unprotected by article 30 of the EC Treaty.[118] The importers of these products made an article 177 challenge to the ECJ.[119] They claimed that Britain had created a two-tiered system which disfavored exporters from other Member States. Defendants pointed out that similar goods manufactured in Britain needed only to pass a far less rigid standard, thus effectuating an "arbitrary discrimination."[120]

The ECJ agreed in theory, and held that Britain's practice was discriminatory, since British officials had created no general prohibition against goods of this type, nor had they adopted any serious or effective measures to prevent the distribution of such goods in Britain.[121]

What can be deduced from the ECJ's reasoning in the *Conegate* case is that the court found that Britain's practice constituted an arbitrary discrimination prohibited under article 36.[122] This most recent case dealing with the public morality clause is far less deferential to Member States than *Henn & Darby*, and takes a much stricter view of their attempts to undermine the unfettered flow of goods in the Community. Because of this holding, the prospect of simply scrapping the public morality exception in favor of a Community conception of public morality becomes all the more viable.

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clear in this case whether the goods involved were legal in Germany.

116. Customs Consolidation Act, 1876, 39 & 40 Vict., ch. 36, § 42 (Eng.).

117. *See Conegate*, 1986 E.C.R. at 1008, [1986] 1 C.M.L.R. at 741.

118. *See id.*

119. EC TREATY art. 177. This article enables individuals to challenge the decisions of Member States' courts, provided that the individual in question has fully exhausted the domestic courts of the Member State. However, ultimate discretion to allow the challenge is left to the court of last resort of the Member State, which must request a preliminary reference to the ECJ under article 177. *See* BERMANN ET AL., *supra* note 6, at 245-48.

120. *Conegate*, 1986 E.C.R. at 1018-19, [1986] 1 C.M.L.R. at 750.

121. *Id.* at 1023, [1986] 1 C.M.L.R. at 753.

122. *See* OLIVER, *supra* note 96, at 183-84 (noting that while the ECJ did not expressly state that the ban constituted an "arbitrary discrimination," the decision effectively stands for that assertion).

C. Interpretation of Article 48: Public Policy Versus Public Morality, and the Precedent for a Public Morality Directive

While article 36 deals solely with public morality as it relates to the free movement of goods, a similarly worded provision, article 48, deals with other justifications for limiting free movement. Under article 48, Member States are permitted to limit the free movement of workers if "justified on grounds of public policy, public security, or public health . . . ."[123] Not included, oddly, is a Member States' ability to limit free movement on the grounds of public morality, as in article 36.

The distinction between "public policy" and "public morality" is left undefined in the Treaty, but the European Council did issue a directive in 1964, which clarified the necessary justification for a public policy exception.[124] The preamble of this directive noted that "co-ordination [of approaches to the free movement of persons] presupposes in particular an approximation of the procedures followed in each Member State when invoking grounds of public policy . . . ."[125] The intent of the directive, then, was to harmonize Member State procedures yet reserve substantive conclusions of public policy to the Member States, subject to judicial control.[126]

While reiterating the fundamental principle of the EC Treaty that public policy shall not be invoked for economic reasons,[127] the Public Policy directive created broad guidelines within which Member States may operate. For instance, the directive states that a person's prior criminal conviction shall not in itself constitute grounds for invoking public poli-

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123. EC TREATY art. 48(3). Articles 36 and 56(1) of the Treaty also include the "public policy" exception, but since they have not been interpreted differently from article 48, *see* OLIVER, *supra* note 96, at 178, they will not be discussed here. *But see* GORMLEY, *supra* note 98, at 129 (positing that "public policy" as used in these three articles of the EC Treaty could be subject to different interpretations).

124. Council Directive 64/221, 1963-1964 O.J. SPEC. ED. 117 [hereinafter Public Policy directive]. The directive outlined, inter alia, the general contours of the public policy exception, as well as the diseases and disabilities which justified limiting the free movement of persons on the basis of public health. However, the phrase "public policy" is never officially defined in the directive, nor has it ever been in a Community document.

125. *Id.* preamble, para. 10.

126. *See* Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337, 1347, [1975] 1 C.M.L.R. 1, 15.

127. *See* Public Policy directive, *supra* note 124, art. 2(2), 1963-1964 O.J. SPEC. ED. at 118.

cy.[128] However, like all EC directives, the implementation of this provision is left to the discretion of Member States.[129] Thus, a Member State may legitimately weigh prior convictions in assessing whether a person is entitled to resident status, but other reasons must be put forth as well; a Member State therefore maintains sovereignty, yet its discretionary power is limited.[130]

Further, article 3 of the directive prohibits utilizing the public policy exception on grounds other than the personal conduct of the individual concerned.[131] This provision seems to parallel the limitations of article 36, which prohibit "arbitrary discrimination" by Member States. Finally, the directive concludes with an Annex listing six categories of diseases and disabilities which would justify a public policy derogation from the free movement of persons.[132]

All of the measures adopted in the directive were deemed necessary by the Council because the concept of "public policy" is so vague, and Member States had tended to utilize the justification to keep out any person deemed undesirable.[133]

The concept of public morality is likewise a vague concept in need of clarification. Member States, in particular Ireland and England, tend to invoke public morality whenever EU law conflicts with their own approach.[134] The continued ability of Member States to invoke the public morality justification thus undermines the intentions of an "ever closer Union,"[135] and

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128. *See id.* art. 3(2).

129. *See supra* note 10.

130. *See Van Duyn*, 1974 E.C.R. at 1348, [1975] 1 C.M.L.R. at 16.

131. Public Policy directive, *supra* note 124, art. 3(1), 1963-1964 O.J. SPEC. ED. at 118.

132. *Id.* art. 4(1), Annex, 1963-1964 O.J. SPEC. ED. at 118-19.

133. *See* BERMANN ET AL., *supra* note 6, at 488; *see also Van Duyn*, 1974 E.C.R. 1337, 1347, [1975] 1 C.M.L.R. 1, 15 (justification of public policy is subject to judicial control). The ultimate holding in *Van Duyn*, however, seems in conflict with the ECJ's later decision in *Conegate*. In *Van Duyn*, the court held that the Public Policy directive permitted restrictions based on public policy if the Member State considered a person's activities socially harmful, even if those same activities could be lawfully practiced by citizens of that Member State. *Id.* at 1352, [1975] 1 C.M.L.R. at 19. In contrast, ten years later the *Conegate* court held that public morality could not be invoked as an excuse to prohibit free trade if the imported goods were legal in the Member State. Case 121/85, Conegate Ltd. v. Her Majesty's Customs & Excise, 1986 E.C.R. 1007, 1025, [1986] 1 C.M.L.R. 739, 755-56.

134. *Cf.* Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) (1988); *Conegate*, 1986 E.C.R. at 1025, [1986] 1 C.M.L.R. at 755; *see* discussion *supra* Part III.B.

135. TREATY ON EUROPEAN UNION preamble, para. 12.

prevents the further integration of Member States, the explicit goal of the EC Treaty. Clarification of the term is therefore necessary. Otherwise, the justification will remain so amorphous that there is no meaning left to the requirements of article 36.

Moreover, the precedent exists for the Council to direct the Member States to follow the guidelines it establishes for the concept of public morality. The precedent comes from the Public Policy directive.[136] Indeed, if the Council had authority to so act in 1964, at a relatively primitive period in European Community development, there should be no question that over thirty years later, following the adoption of the TEU, the Council has authority to issue a directive adopting a uniform approach to issues of public morality.

D. Public Morality and the Patent Conventions of Europe

It is important to note that the public morality exception is invoked by Member States in situations that do not involve erotic materials. Otherwise, the usefulness of the discussion in this Note would be negligible, much as the economic impact of erotic materials is on the European financial markets. Rather, public morality is also invoked by Member States as a method of objecting to patents which rely on new technologies. As technology further develops, issues with fundamental moral implications arise, and the law in this area is being outpaced. These new technologies, and their morality or immorality, should be approached with Community-wide agreement, in order to avoid splintering among Member States.

As part of a harmonization directive, the EC in 1973 required all Member States to join in establishing the European Patent Convention (EPC).[137] Under the EPC, Ireland, like all Member States, must agree to respect patents issued in other Member States.[138] However, the EPC provides the same reservation as the EC Treaty's article 36, by which Member States can avoid issuing patents which would run contrary to domestic moral norms.[139] Article 53 specifically provides that

136. *See supra* note 124 and accompanying text.
137. Convention on the Grant of European Patents, Oct. 5, 1973, 13 I.L.M. 270.
138. *Id.* art. 2(2), 13 I.L.M. at 276.
139. *Id.* art. 53(a), 13 I.L.M. at 286. Article 36 of the EC Treaty also provides

"[n]o patent must be granted for inventions the publication or exploitation of which would be contrary to *ordre public* or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States."[140] The ECJ has never assessed this contorted article;[141] however, examples of the potential conflicts between national sovereignty and the Community-wide harmonization of patents do exist, and likely will be litigated in the near future.

For instance, the recent dispute over the morality of using fetal tissue for medical research is an especially bitter dispute in Ireland. The debate arose when Swedish medical research teams began using the eye tissue of aborted fetuses for the development of new pharmaceuticals to improve vision in el-

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that the protection of commercial and industrial property rights (collectively, intellectual property rights) continues to be governed by the Member States. The extent to which this prevents Community-wide harmonization of intellectual property rights has been widely contested, but is beyond the scope of this Note. Rather, this Note focuses on article 36 only as it relates to public morality. For a discussion of the extent to which intellectual property rights are reserved to the Member States through article 36, see A. David Demiray, *Intellectual Property and the External Power of the European Community: The New Extension*, 16 MICH. J. INT'L L. 187 (1994); *see also* E.L.M. VÖLKER, BARRIERS TO EXTERNAL AND INTERNAL COMMUNITY TRADE (1993). Other examples of treaties which provide for this "safety valve" for moral reasons, and which are not discussed here, include the Agreement on Trade-Related Aspects of Intellectual Property Rights (commonly known as the TRIPS agreement), a sub-agreement of the Uruguay Round of the General Agreement on Tariffs and Trade. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. 27(2), Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 1197, 1208; *see also* International Covenant on Civil and Political Rights, *supra* note 32, art. 19(3)(b), SEN. EXEC. DOC. E, 95-2, at 29 (1978), 999 U.N.T.S. at 178 (freedom of expression may be limited by states to protect public morals). These international treaties, however, should be distinguished from the EC Treaty, which sets as its task the fundamentally different goal of future union among Member States.

140. Convention on the Grant of European Patents, *supra* note 137, art. 53(a), 13 I.L.M. at 286; *see also id.* art. 138(1)(a), 13 I.L.M. at 290 (a patent may be revoked "if the subject matter of the European patent is not patentable within the terms of [article 53]"). The concept that an object may be unpatentable because of its potential to violate morality or *ordre public* has no counterpart in American patent law. Apparently it is unique to the European patent regime. *See* David G. Scalise & Daniel Nugent, *Patenting Living Matter in the European Community: Diriment of the Draft Directive*, 16 FORDHAM INT'L L.J. 990, 1014 (1993).

141. The Court of Justice would ostensibly have jurisdiction over matters concerning the EPC, since the court is authorized to rule on "the validity and interpretation of acts of the institutions of the Community." EC TREATY art. 177, para. 1(b).

derly patients. In protest, the Irish government has threatened to invoke the public morality exception in article 53(a) of the EPC to prohibit recognition of any patents which issue in relation to the research.[142] And this is but one example. Other examples of contentious developments involving new technologies are increasingly common, and range from moral and religious objections to genetic engineering to the debate over censorship of pornography on the Internet.[143]

While such issues are thoroughly contentious, and a consensus on their morality or immorality may never be achieved, the economic impact of the conservative European approach to patent law is not in debate. Faced with rigid rules and narrow views of biotechnological research, many of Europe's leading biotechnology companies have relocated outside the European Union.[144] This economic fallout from motivations deeply based in morality must be assessed, and dealt with at the Community level to prevent further fiscal flight.

Thus, it is apparent that the public morality exception in the EPC is equally open to abuse by Member States, and has the potential to hamper severely the free flow of goods in the EU. Consequently, any directive passed by the Council should include measures to harmonize the concept of public morality with respect to patents. The potential for this harmonization could be facilitated by recent developments.

While the EPC represents an era of Community law which predominated before the passage of the TEU, a new patent scheme reflects the growing interest in (or at least acceptance of) further harmonization and integration of Member State law. This new scheme, based in the Community Patent Convention (CPC),[145] still awaiting ratification by all Member

142. *See* Geraldine Kennedy, *Bishops Issue Condemnation of Swedish Report*, IRISH TIMES, Dec. 7, 1995, at 1.

143. *See* Tom Wilkie, *Geneticists Lay Claim to 'God's Creature,'* INDEPENDENT (London), Nov. 20, 1995, at 1 (religious and animal welfare groups objecting to attempts to patent animals and plants as violative of article 53(a) of the EPC); 1995 O.J. (C 230) 26 (written question to the European Commission regarding the Internet and public morals); *see also* Richard U. Hausknecht, *Methotrexate and Misoprostol to Terminate Early Pregnancy*, 333 N. ENG. J. MED. 537 (1995) (conclusions of study using medical, as opposed to surgical, methods for pregnancy terminations by combining legally available pharmaceuticals); Jesse Freund, *Gatorade for Vampires*, WIRED, Apr. 1996, at 50 (reporting successes in artificial blood substitutes).

144. *See* Scalise & Nugent, *supra* note 140, at 991.

145. Convention for the European Patent for the Common Market, *opened for*

States in late 1996,[146] would take great steps toward integrating the EU Member States' approaches to intellectual property. In essence, the CPC will create a central Community Patent Office (CPO), which will issue Community patents. All patents issued by the CPO will be valid in all Member States, and each Member State must fully comply with and respect all patents issued by the CPO.[147] Community patents will have a unitary character and an equal effect throughout the territory of the Member States.[148] In addition, all European patents issued under the old EPC will be transformed into Community patents. Once transformed, these patents must also be fully respected by Member States.

Thus, issues of patentability arising from moral implications will be decided at the supranational level of the CPO, once the CPC has been ratified by all Member States.[149] If and when the CPC is ratified by all Member States, it should fully reflect and incorporate the provisions of the Public Morality directive. To this end, the CPC's counterpart to the EPC's article 53(a) should include the same basic Community guidelines outlined in the directive for limiting patents based on public morality objections.

Importantly, a recently proposed EU directive on biotechnological patents contained a provision that would have definitively established guidelines on how the concept of "public morality" should be interpreted.[150] Specifically, article 9 of the directive would have required that any assessment of public morality be made in accordance with the principle of proportionality and under guidelines established by the European

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signature Dec. 15, 1975, 1976 O.J. (L 17) 1 [hereinafter CPC]. Member States revised the Convention in 1992. *See* COOPERS & LYBRAND, EC COMMENTARIES: INTELLECTUAL PROPERTY § 3.3 (Aug. 24, 1995).

146. As of late 1996, only Ireland and Denmark had yet to ratify the CPC, and both were expected to capitulate in the near future. The newest Member States—Austria, Sweden, and Finland—all agreed to sign the Convention simultaneously with their entry into the EU. *See Intellectual Property: European Union Will Face Important Intellectual Property Issues this Year*, Daily Rep. for Executives (BNA), May 15, 1995, *available in* LEXIS, Exec Library, Drexec File.

147. *See* COOPERS & LYBRAND, *supra* note 145, § 3.3.

148. *See id.*

149. *See* Anthony D. Sabatelli, *Impediments to Global Patent Law Harmonization*, 22 N. KY. L. REV. 579, 598 (1995).

150. *See Proposal for Directive on the Legal Protection of Biotechnological Inventions*, Reuter Textline, Dec. 20, 1995, *available in* LEXIS, Eurcom Library, Txtec File.

Parliament.[151] Though the EU dropped the proposed directive in favor of ensuring the ratification of the CPC,[152] any provision dealing with public morality in the revised CPC should utilize the language of article 9 of the biotechnology directive. In this way, the economic growth expected from breakthroughs in areas such as biotechnology will not be distributed unevenly throughout the European Union.

IV. THE POLITICAL NECESSITY OF A PUBLIC MORALITY DIRECTIVE IN EUROPE

The notion of a directive to unify the way in which Member States approach issues of public morality is indeed a controversial one. While commentators in the 1980s were inclined to dismiss perfunctorily the possibility of Community proposals directed at the harmonization of the concept of public morality,[153] the advent of recent further commitments to European consolidation makes a public morality directive more viable. The Treaty on European Union, only recently agreed upon, has created the dual objectives of a political and monetary union of the Member States. Both of these visionary objectives (indeed the TEU itself) have met with staunch opposition by less committed Member States.[154] While a proposal for a Community-

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151. *See id.*

152. *See id.*

153. *See* GORMLEY, *supra* note 98, at 127 (believing Community action on this point "a thought which is so unlikely as not to be a realistic proposition").

154. The TEU passed by only a narrow margin in many of the more populous Member States. For example, in France, an original member of the Community, only 51.5% of the population voted in favor of adoption of the TEU. *See* Francois Raitberger, *Mitterand Hails "Historic" Maastricht Victory*, Reuters, Sept. 20, 1992, *available in* LEXIS, Intlaw Library, Ecnews File.

More starkly, Denmark's population initially refused by popular vote to adopt the TEU. *See* Andrew Gumbel, *Danish EC Vote Puts Mitterand Under Pressure*, Reuters, June 4, 1992, *available in* LEXIS, Europe Library, Arcnws File. A second referendum was quickly held, with minimal changes to the wording of the referendum, and this time the majority of the people of Denmark voted to adopt the TEU; the rest of Europe followed suit. *See* Carolyn Rhodes & Sonia Mazey, *Introduction: Integration in Theoretical Perspective*, *in* 3 THE STATE OF THE EUROPEAN UNION: BUILDING A EUROPEAN POLITY? 1, 2 (Carolyn Rhodes & Sonia Mazey eds., 1995). The European Community transformed into the European Union on January 1, 1994. *See* Aaron Wildavsky & L.R. Jones, *Budgetary Control in a Decentralized System: Meeting the Criteria for Fiscal Stability in the European Union*, PUB. BUDGETING & FIN., Winter 1994, at 7, 7. *But see* Christopher Anderson, *Economic Uncertainty and European Solidarity Revisited: Trends in Public Support for European Integration*, *in* 3 THE STATE OF THE EUROPEAN UNION: BUILDING A

wide threshold concept of public morality would no doubt meet with similar resistance, such a directive is necessary to help achieve implementation of the objectives set by the TEU by creating, albeit forcibly, a stronger cultural association between the peoples of the Member States.

What the directive would serve to accomplish would be a basic bandwidth of morality, outside of which a Member State could not stray.[155] Once all Member States conform to the confines of this bandwidth, then the objectives of the directive would be complete, and the European Union would be a stronger political and social union because of it. The creation of a determinative bandwidth of public morality, and indeed a workable definition of that term,[156] is central to the creation of community conscience.[157]

The bandwidth is yet to be determined, but its necessity is evident from the widely disparate and uneven approaches to public morality currently practiced by the several Member States. Recall the language of the court in the *Casati* case.[158]

EUROPEAN POLITY? 111, 127-29 (1995) (discussing public opinion polls of the EU, and the possibility that public support for integration has hit or will hit a ceiling). Indeed, the argument over Danish participation in the EU is far from over. On August 12, 1996, the Danish Supreme Court ruled that a district court must hear a complaint brought by 11 Danish citizens who argue that Denmark's membership in the EU is unconstitutional. *See Denmark: Not So Fast*, ECONOMIST, Aug. 31-Sept. 6, 1996, at 43, 43. The issue may not be resolved for another four to five years, and may derail any further integration efforts made at the Inter-governmental Conference (IGC) being held during 1996 and 1997. *See id.*; *see also* TREATY ON EUROPEAN UNION art. N(2) (mandating the 1996 IGC).

Perhaps the most extreme example of opposition to renewed integration came from Britain, which failed to even poll its population about the TEU. Prime Minister John Major, fearing an embarrassing defeat if the referendum failed to pass, pushed the TEU through Parliament. Furthermore, Britain found it necessary to "opt out" of many of the major portions of the TEU, including the goal of monetary union and major social reforms. *See* Rhodes & Mazey, *supra*, at 3. However, Britain's resistance to integration may crumble as political and monetary union become a reality in 1999. *See The Train Now Stranded in the City of London . . .* , ECONOMIST, Aug. 3-9, 1996, at 61.

155. Such a directive would be in conformity with the ultimate purpose of Council directives, since by their very nature directives "do not replace national law, but only mandate its content to varying degrees." DINNAGE & MURPHY, *supra* note 3, at 119.

156. The term could be defined along the lines of the working definition used in the proposed biotechnology directive. *See supra* text accompanying notes 150-52.

157. *See* HARRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY 36-37 (1996).

158. Case 203/80, Criminal Proceedings Against Casati, 1981 E.C.R. 2595, [1982] 1 C.M.L.R. 365; *see supra* text accompanying notes 44-47.

The ECJ stated that "Community law . . . sets certain limits . . . as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods . . . ."[159] These "certain limits" for public morality have never been consistently set by the Community. They need to be, in order to prevent economic losses due to barriers to free trade within the EU. The Public Morality directive is the proper vehicle to create this bandwidth and the "certain limits" to which the court alluded in *Casati*.

While the directive can be seen as necessary to achieve the goal of a more unified EU, the directive must also be feasible. One factor to consider in the feasibility of the directive is the continuing solidification of Union policy. It is important to note that the controlling cases in regards to the public morality exception in article 36, *Henn & Darby* and *Conegate*, were decided before the renewed push to further integrate the Member States. Even *Conegate*, decided in 1985, was published prior to two key reaffirmations of European integration.

First, in the late 1980s, the Single European Act (SEA)[160] encouraged closer interaction in the EC,[161] mainly through what some commentators have called "negative integration," or the removal of barriers to the free movement of goods, workers, services and capital.[162] The SEA also refers to (without specifically incorporating the terms of) the European Convention on Human Rights,[163] and inserts additional provisions into the original EEC Treaty dealing with the increased harmonization of social policy, research, and technological development.[164] Second, and more importantly, during the early 1990s the TEU reaffirmed Europe's commitment not only to a

159. *Casati*, 1981 E.C.R. at 2618, [1982] 1 C.M.L.R. at 396.

160. EEC TREATY (as amended 1987).

161. As set forth in the first article, "[t]he European Communities . . . shall have as their objective to contribute together to making concrete progress towards European unity." SINGLE EUROPEAN ACT, tit. 1, art. 1.

162. Rhodes & Mazey, *supra* note 154, at 2.

163. European Convention for the Protection of Human Rights and Fundamental Freedoms, *done* Nov. 4, 1950, 213 U.N.T.S. 221.

164. *See* CASEY, *supra* note 25, at 179-80; *see also* SINGLE EUROPEAN ACT, tit. III, art. 30(6)(b) (technological and research cooperation); *id.* preamble, para. 6 (economic and social cooperation). The SEA also amended the original EEC Treaty to permit the Council to act by qualified majority as opposed to unanimity, an important change in what was previously a burdensome process. *See* EEC TREATY arts. 28, 59, 70, 84(2) (as amended 1987).

single economic market, but to a political and monetary union as well.[165]

These treaties signal a further willingness to adopt integration measures in the EU. Moreover, as it has been shown in this Note, specified reservations to Member States are capable of being confined to certain requirements.[166] Thus, despite the fact that article 36 specifically allows Member States to prohibit free trade, and despite the fact that such controversial directives are rarely issued, precedent exists for the EU to set guidelines on public morality which Member States must follow. Just as the Public Policy directive in 1964 limited the degree to which public policy could limit the free flow of persons within the Community,[167] so too could a directive aimed at limiting the public morality exception be issued to deal with the various approaches to public morality.

In determining the viability of a public morality directive, it is useful to recall the language of the Court of Justice in the *Henn & Darby* decision. The court stated that *"[i]n principle*, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory."[168] One commentator has noted that the court's statement is prefaced by a qualification. "The use of the words 'in principle' indicates that the Member States may only exercise their discretion within the boundaries of a Community-wide conception of public morality."[169] This Community-wide conception is precisely what the public morality directive would serve to achieve, and it is this conception that is glaringly omitted from current European Union law.

One fairly obvious objection to the directive can be easily dismissed. Such a sinister-sounding piece of legislation, it may be argued, is merely another example of Eurocrats overriding the sovereignty of Member States in order to enforce their own viewpoints. But this is not the case. No enforcement procedures would be incorporated into the directive; rather, the

165. *See* Rhodes & Mazey, *supra* note 154, at 2.

166. *See supra* note 94 and accompanying text.

167. *See supra* notes 124-33 and accompanying text.

168. Case 34/79, Regina v. Henn & Darby, 1979 E.C.R. 3795, 3813, [1980] 1 C.M.L.R. 246, 272 (emphasis added).

169. OLIVER, *supra* note 96, at 181.

directive would serve to create basic guidelines that keep Member States harmonious in their approach to issues of public morality. The directive is not intended to be rigidly formalistic, and would go only slightly further than the broad outlines of the Public Policy directive; this ability to harmonize further is made possible through recent integration developments.

Moreover, the Member States implicitly relinquished some amount of sovereignty by adopting article 235 of the EC Treaty, which attempts to mirror the language of the Necessary and Proper clause of the United States Constitution.[170] Specifically, article 235 of the EC Treaty states that "[i]f action by the Community should prove necessary to attain . . . one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measure."[171] Thus, the Commission could decide that if such a directive was not specifically viable, the measure could still be passed by invoking the language of article 235.

Yet it could be argued that such a directive goes beyond what is necessary under the Treaty to realize the goals of the Treaty. Article 3b of the EC Treaty states that "[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."[172] However, a public morality directive could be considered necessary for two reasons, as a means of advancing both the economic and social cohesion of the Union.

First, and ostensibly most important, as far as economic cohesion is concerned, this directive would benefit both Ireland's struggling economy and the EU in general. The directive would create a freer market by clearly defining the contours of the public morality exception, while still retaining the potential for Member States to invoke the exception. Uninhibited commerce is the cornerstone of the TEU, and a public

170. U.S. CONST. art. I, § 8, cl. 18; *see* Eric Stein, *Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution*, *in* 1 INTEGRATION THROUGH LAW: METHODS, TOOLS AND INSTITUTIONS 21 (Mauro Cappelletti et al. eds., 1985).

171. EC TREATY art. 235.

172. EC TREATY art. 3b, para. 3.

morality directive would achieve this, not only in the traditional areas used by Member States to exclude goods, but also in new technological areas, as shown in Part III.D.

Second, the directive could be considered necessary as a means of advancing social cohesion. Perhaps the most lasting ramification of the directive would be its potential to create the guise of similarity in Europe. Currently, there are some relatively stark differences between the concepts of public morality in socially liberal Member States such as Sweden, Denmark or the Netherlands, and a historically conservative Member State like Ireland. A directive would not necessarily require Ireland to allow every good sold in those Member States to be sold in Ireland, but the directive could begin the movement toward moderation, perhaps on both sides. Thus, Ireland would be required to open its borders to some objectionable material, while countries such as Sweden, Denmark, and the Netherlands would be required to centralize their stance on morally objectionable material in other countries, and discourage production at home. Clear guidelines established at the Community level would create a measure of certainty for manufacturers and researchers throughout the EU.

Finally, to reiterate the delineations made in Part III.D of this Note, all Member States could harmonize from the outset their approach to public morality in the area of emerging technological advances, including biotechnology. Difficult decisions about the morality or immorality of important technical achievements await in the coming years, and a Community-wide agreement on their moral acceptance is necessary to maintain free trade in the EU of the twenty-first century. By including public morality guidelines for these scientific and technical advances in the directive, the Community can uniformly approach sensitive moral issues, yet still reserve to the Member States a modest measure of sovereignty. In this way, the vision of the drafters of the TEU would be realized, and the European states would be moving toward the true goal of an "ever closer union."[173]

173. TREATY ON EUROPEAN UNION preamble, para. 12.

V. CONCLUSION

The primary benefit of a public morality directive is the chance it offers to unite the disparate approaches to moral issues in the Member States, particularly Ireland's erratic view of public morality. This benefit creates a veil, no matter how thin, of unanimity, a current necessity in the vacillating EU. Economic integration must consistently be connected to Community integration, and such a directive would fulfill that purpose. As a secondary benefit, a public morality directive would create a balanced economic and moral approach to potentially divisive new technologies. Centralization is the key to this directive, and to remain competitive in the global market, the EU must continue to work towards further centralization, yet simultaneously preserve measures in the EC Treaty. This seeming paradox is overcome by the implementation of a measure of social cohesion heretofore unknown in the Community, but the final goal of an ever closer Union must be realized. The adoption of a uniform approach to public morality will not only serve this purpose by consolidating the gains made in recent years, but it will also mark the beginnings of a Community-based conscience, which will further the integration process. Ultimately, case-by-case decisions of the ECJ may assist in determining the finer points of the European approach to public morality, but in the end these decisions are mere tinkering. Case law cannot be a substitute for Community legislation.[174] The Commission must act by making the difficult, but important, decision to propose a public morality directive.

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174. *See* Dauses, *supra* note 94, at 230.