Matters of Life and Death: Remarks

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Cover Page Footnote
Chief Justice Hamilton is currently the Chief Justice of the five-member Supreme Court of Ireland, which determines the constitutionality of statutes and, in prescribed circumstances, renders advisory opinions to the President of Ireland, Mrs. Mary Robinson. Chief Justice Hamilton practiced law as a barrister for 18 years prior to his appointment to the High Court, which is analogous to the U.S. Court of Appeals, in 1974. While on the High Court, Chief Justice Hamilton served as President of the Special Criminal Court for over a decade. He was appointed President of the High Court in 1985. He was appointed Chief Justice of the Supreme Court by the President of Ireland in 1994. Chief Justice Hamilton was educated at the Christian Brothers School, Mitchelstown, Cork. He received his legal education at University College, Dublin, and the Honorable Society of King’s Inns. He received the Benchers Prize for Best King’s Inns Student called to the Bar in his year.
MATTERS OF LIFE AND DEATH*

Liam Hamilton**

I am extremely privileged and honoured to have been invited to deliver the Twenty-fourth Annual John F. Sonnett Memorial Lecture here at Fordham University School of Law.

My appreciation of such privilege and honour was accentuated when I read the list of previous lecturers who have delivered this lecture in memory of John F. Sonnett, a distinguished graduate of this University and this School of Law, who devoted his life to the practice of law and to public service.

I am delighted to follow in their footsteps, particularly in the footsteps of my two predecessors as Chief Justice of Ireland, namely the late Cearbhall Ó Dálaigh and the recently retired Thomas Finlay.

I hope that you will find my address to you interesting because, in it, I propose to deal with two matters which are of common interest to our two countries, viz. the right to life and the right to die, but I intend to deal only with such rights under the Irish Constitution and the manner in which they have been dealt with by the Irish courts—producing an Irish solution to an Irish problem.

The authors of our 1937 Constitution, which came into effect on 29 December 1937,1 in including a section on fundamental rights, could have had little idea of the revolutionary impact it would have on Irish society. The then-Taoiseach [Prime Minister] Mr. de Valera seems to have viewed the provisions as being mere "headlines for the Legislature"—standards for government to aim at, but not for courts to enforce.2 Articles Forty through Forty-four gave express recognition to those rights most prized in Western liberal democracies—personal liberty, freedom of expression, equality before the law, ownership of

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2. 68 Dáil Deb. cols. 216-17 (June 9, 1937).
property, and freedom of religious belief and practice.\textsuperscript{3} The social policy of the Catholic Church also made itself felt, in the form of provisions recognising the Family as “the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.”\textsuperscript{4}

Article Forty-two recognises the right of parents to educate their children, and pledges the State to support this “as guardian of the common good.”\textsuperscript{5}

Aside from such specific protections, the framers of the Constitution included some more general statements in Article Forty, section three. They read as follows:

1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.\textsuperscript{6}

The first generation of Irish judges had spent their working lives in a pure common law environment, where Parliament reigned supreme. Old habits die hard, and it is not surprising if a certain wariness and timidity coloured judgments in the first few decades of the new constitutional era. But beginning in the 1960s, the two short sentences of Article Forty, section three became the basis for a series of revelatory judgments which have changed Irish society, and indeed continue to do so.

Since these early years, a new race of right-conscious citizens has grown up; there has also been a new race of right-conscious young lawyers and gradually there has been a new breed of judges.

The first case to really break new ground was \textit{Ryan v. Attorney General}\textsuperscript{7} in 1963. Mrs. Ryan challenged the right of the State to fluoridate water supplied to her home without her consent.\textsuperscript{8} She failed in her application, but Justice Kenny of the High Court held that a right of “bodily integrity” did exist, being one of an unenumerated list of rights protected by Article Forty, section three, subsection one.\textsuperscript{9} As to where those rights might be found, he said:

In my opinion, the High Court has jurisdiction to consider whether an Act of the Oireachtas [Parliament] respects and, as far as practicable, defends and vindicates the personal rights of the citizen and

\begin{itemize}
\item[3.] See Ir. Const. arts. 40-44.
\item[4.] Id. art. 41, § 1(1).
\item[5.] Id. art. 42, §§ 1, 5.
\item[6.] Id. art. 40, § 3(1)-(2).
\item[8.] See \textit{id.} at 296-97 (Kenny, J.).
\item[9.] Id. at 313.
\end{itemize}
to declare the legislation unconstitutional if it does not. I think that the personal rights which may be involved [sic] to invalidate legislation are not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State. It is, however, a jurisdiction to be exercised with caution. None of the personal rights of the citizen are unlimited: their exercise may be regulated by the Oireachtas when the common good requires this. When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen. Moreover, the presumption that every Act of the Oireachtas is constitutional until the contrary is clearly established applies with particular force to this type of legislation.

The next matter to be considered . . . is whether the general guarantee in Article 40, section 3, relates only to those personal rights which are specified in Article 40 or whether it extends to other unspecified personal rights of the citizen. If it extends to personal rights other than those specified in Article 40, the High Court and the Supreme Court have the difficult and responsible duty of ascertaining and declaring what are the personal rights of the citizen which are guaranteed by the Constitution.

It is important to note that the personal rights which the courts are obliged to ascertain and declare are those which are guaranteed by the Constitution as arising from the Christian and democratic nature of the State.

Interestingly, Justice Kenny quoted a Papal Encyclical in support of the right to bodily integrity, and his willingness to allow his reading of the Constitution to be informed by documents of a religious rather than a legal nature marked the beginning of a long and tortuous debate on the proper place of Christian moral teaching in Irish legal and political life. His identification of the State as Christian in nature was made boldly, Justice Kenny presumably feeling that it was too obvious to require proof. Since then, some judges have cited the Preamble to the Constitution in support of it. That begins: "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 . . . [h]umbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial . . . ."
The Supreme Court in *Ryan* reaffirmed the existence of unenumerated personal rights, though without reference to Justice Kenny's Christian/democratic theory.\textsuperscript{13} However, within a decade came *McGee v. Attorney General*.\textsuperscript{14} The Supreme Court, in striking down legislation penalising the importation of contraceptives, found a constitutionally protected right of privacy within marriage.\textsuperscript{15} Curiously, only one judge, Justice Griffin, referred to the judgment of Justice Kenny in *Ryan*.\textsuperscript{16} Justice Walsh, generally recognised as the intellectual leader of the Court at that time, preferred to find the source of unnamed rights in the concept of *natural law*. To this end, he invoked the wording of the fundamental rights articles in the Constitution, saying:

Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection.

\textldots The very structure and content of the Articles dealing with fundamental rights clearly indicate that justice is not subordinate to the law. In particular, the terms of s. 3 of Article 40 expressly subordinate the law to justice.\textsuperscript{17}

While admitting that "[w]hat exactly natural law is and what precisely it imports is a question which has exercised the minds of theologians for many centuries and on which they are not yet fully agreed,"\textsuperscript{18} the judge nonetheless felt that the Constitution imposed a duty on the Court to consider and decide upon what rights are protected by natural law, as and when parties to a case attempt to rely on such rights.\textsuperscript{19}

He further stated:

In this country it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable. In the performance of this difficult duty there are certain guidelines laid down in the Constitution for the judge. The very structure and content of the Articles dealing with fundamental rights clearly indicate that justice is not subordinate to the law. In particular, the terms of s. 3 of Article 40 expressly subordinate the law to justice. Both Aristotle and the Christian philosophers have regarded justice as the highest human virtue. The

\textsuperscript{13} See *Ryan*, 1965 I.R. at 335-53 (Ó Dálaigh, C.J.).


\textsuperscript{15} See id. at 312-14 (Walsh, J.).

\textsuperscript{16} See id. at 332-33 (Griffin, J.).

\textsuperscript{17} Id. at 310, 318 (Walsh, J.).

\textsuperscript{18} Id. at 318.

\textsuperscript{19} See id.
virtue of prudence was also esteemed by Aristotle as by the philosophers of the Christian world. But the great additional virtue introduced by Christianity was that of charity—not the charity which consists of giving to the deserving, for that is justice, but the charity which is also called mercy. According to the preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideal of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.20

Explicit references to the Christian character of the State surfaced again in the case of Norris v. Attorney General,21 which concerned a challenge to laws penalising homosexual acts between males. Mr. Norris submitted that he had a constitutionally protected right of privacy—along the lines of the protection of marital privacy in McGee—which was being infringed.22 In denying the existence of such a right, a three-to-two majority of the Supreme Court (led by Chief Justice O’Higgins) was heavily influenced by the Christian ethos of the Constitution itself, and in particular the references to Jesus Christ and the Trinity in the Preamble. Chief Justice O’Higgins said:

It cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, 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. Yet it is suggested that, in the very act of so doing, the people rendered inoperative laws which had existed for hundreds of years prohibiting unnatural sexual conduct which Christian teaching held to be gravely sinful. It would require very clear and express provisions in the Constitution itself to convince me that such took place.23

Both Justice McCarthy and Justice Henchy delivered trenchant dissenting judgments, yet neither felt able to deny or play down the importance of the Christian ethic in the identification of constitutional rights. The difference was one of emphasis: Both dissenting judges preferred to name charity, rather than justice, as the primary Christian virtue in a pluralist, democratic society.24 Justice McCarthy com-

20. Id. at 318-19.
22. See id. at 54-55 (O’Higgins, J.).
23. Id. at 64.
24. See id. at 75-78 (Henchy, J.); id. at 99-100 (McCarthy, J.).
mented on Justice Kenny's dictum in *McGee v. Attorney General* as follows:

In so far as the judgment of Kenny J. . . ., in referring to the Christian and democratic nature of the State, is a relevant identification of source . . . I would respectfully dissent from such a proposition if it were to mean that, apart from the democratic nature of the State, the source of personal rights, unenumerated in the Constitution, is to be related to Christian theology, the subject of many diverse views and practices, rather than Christianity itself, the example of Christ and the great doctrine of charity which He preached. Jesus Christ proclaimed two great commandments - love of God and love of neighbour; St. Paul, the Apostle to the Gentiles, declared that of the great virtues, faith, hope and charity, the greatest of these is charity . . . .

*Norris* was decided in 1983. That was also the year in which a referendum to amend the Constitution ignited the previously smouldering issue of abortion in Ireland. But to understand how this even came about, we must turn back the clock to January 1973 in America, and *Roe v. Wade*. A majority of the United States Supreme Court, led by Justice Blackmun, held that the right to privacy identified in *Griswold v. Connecticut* extended to "a woman's decision whether or not to terminate her pregnancy." Once the Irish Supreme Court had found a right to marital privacy in *McGee*, it was feared by some commentators that the Court might one day extend this right to cover abortions, in the same manner as *Roe v. Wade*. In truth, this seemed an unlikely prospect; abortion had been a statutory offence since 1861, and both popular and judicial opinion seemed to support this. Indeed, the majority in *McGee* went out of its way to point out that its decision had no bearing on the abortion issue, Justice Walsh commenting that "this case is not in any way concerned with instruments, preparations, drugs or appliances, etc., which take effect after conception" and later: "[A]ny action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question."

Justice Walsh repeated this observation in *G. v. An Bord Úchtdála*, a 1978 case concerning adoption, and similar views were expressed by Justice McCarthy in the *Norris* case mentioned earlier.

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31. Id. at 312.
As President of the High Court, I gave judgment in the case of Attorney General v. Open Door Counselling Limited and Dublin Wellwoman Centre Limited, subsequently appealed to the Supreme Court. In the course of the opinion I summarised the legislative history of abortion in Ireland:

The right to life of the unborn has always been recognised by Irish law.

It has been recognised at common law; by statute law; as one of the unenumerated personal rights which the State guaranteed by its laws to respect, and, as far as practicable, to defend and vindicate and is specifically acknowledged by the provisions of the Eighth Amendment to the Constitution. Abortion is an interference with and a destruction of the right to life of an unborn infant in the mother's womb and as such is an offence contrary to Irish law. Originally, it was an offence contrary to the common law. The common law misdemeanour of abortion applied, however, only after the child had quickened in the womb.

The statute, (43 Geo. III, c. 58) of 1803 enacted that it should be a felony punishable by death to administer poison with intent to procure the miscarriage of a woman quick with child and a felony punishable with imprisonment or transportation for fourteen years to administer poison with a like intent to a woman who was not proved to be quick with child.

As stated in the third edition of Smith and Hogan: Criminal Law p. 275, the distinction between quick and non-quick women gave rise to complications and this distinction disappeared in the re-enactment of the law by the Offences Against the Person Act, 1839, which established substantially the law in its present form.

The current statute applicable is the Offences Against the Person Act, 1861.

Section 58 of this Act provides that:

“Every Woman being with Child, who, with Intent to procure her own Miscarriage, shall unlawfully administer to herself any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, and whosoever, with Intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall unlawfully administer to her or cause to be taken by her any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, shall be guilty of Felony, and being convicted thereof, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life . . . or to be imprisoned for any Term not exceeding Two Years . . .”

Section 59 of the said Act provides that:

34. 1988 I.R. 593 (Ir. S.C. 1988). The relators in the case, the Society for the Protection of Unborn Children Ireland Limited, will be referred to hereinafter as “SPUC.”
“Whosoever shall unlawfully supply or procure any Poison or other noxious Thing, or any Instrument or Thing whatsoever, knowing that the same is intended to be unlawfully used or employed with Intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall be guilty of a Misdemeanour, and being convicted thereof shall be liable... to imprisonment for any term not exceeding two years...”

The Health (Family Planning) Act, 1979, reaffirmed the acceptance by the Oireachtas of Sections 58 and 59 of the Offences Against the Person Act, 1861, as setting forth the law of abortion in this jurisdiction.

Section 10 of the said Act provides that:-

“Nothing in this Act shall be construed as authorising -
(a) the procuring of abortion,
(b) the doing of any other thing the doing of which is prohibited by Section 58 or 59 of the Offences Against the Person Act, 1861 (which sections prohibit the administering of drugs or the use of instruments to procure abortion or the supplying of drugs or instruments to procure abortion) or
(c) the sale, importation into the State, manufacture, advertising or display of abortifacients.”

Sections 58 and 59 of the Offences Against the Person Act, 1861, protected and protect the foetus in the womb and having regard to the omission of the words “Quick with child” which were contained in the statute of 1803 hereinbefore referred to, that protection dates from conception. Consequently, the right to life of the foetus, the unborn, is afforded statutory protection from the date of its conception.

Prior to the enactment of the Eighth Amendment to the Constitution the right to life of the unborn had been referred to and acknowledged by Walsh J. in the course of his judgment in G. v. An Bord Uchtála [1980] I.R. 32 when he stated at p. 69 of the report:-

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

intentionally or by neglect to endanger the health or life of the child or to terminate its existence. The child's natural right to life and all that flows from that right are independent of any right of the parent as such.”

He then repeated what he had said in McGee v. Attorney General [1974] I.R. 284 at p. 312 of the report:

“... any action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question.”

These passages clearly acknowledge:

(1) the right to life of the unborn;
(2) that that right springs primarily from the natural right of every individual to life;
(3) the right includes the right to have that right preserved and defended and to be guarded against all threats to its existence before or after birth;
(4) that it lies not in the power of a parent to terminate its existence, and
(5) any action on the part of any person endangering human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question.

Nonetheless, support grew for an amendment to the Constitution explicitly recognising the right to life of unborn children; the intention was to copperfasten the existing situation, removing any possibility of a future court using Roe v. Wade-style reasoning to “frustrate” the democratic will of the people. Ideally, debate should have been confined to the merits of amending the Constitution in this fashion, but a series of emotionally charged campaigns on both sides quickly polarised positions and led many people to assume that a vote against the amendment was tantamount to overt support for the introduction of abortion. It is a pity that public discourse was diverted in this way; it is possible that the paucity of debate concerning the usefulness of the amendment, its actual wording, and whether it was likely to achieve its object, contributed in no small measure to the problems which were to come. In any event, no party, of any persuasion, foresaw the manner in which the Supreme Court would interpret those words in Attorney General v. X.

The Eighth Amendment to the Constitution was approved by a large majority of the people on 7 September 1983. It reads: “The

35. Id. at 597-99 (Hamilton, P.).
37. See John M. Kelly, The Irish Constitution 792 (Gerard Hogan & Gerry Whyte, 3d ed. 1994).
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.\textsuperscript{38}

The nature and extent of this right was first considered by the Supreme Court in the \textit{Open Door} case, mentioned above. The defendants in this case

consider[ed] it essential to the service which they wish[ed] to provide that they should be at liberty to inform such women who wish to have an abortion outside the jurisdiction of the Court of the name, address, telephone number and method of communication with a specified clinic which they had examined and were satisfied was one which maintained a high standard,\textsuperscript{39}

but it was declared by the Supreme Court

that the activities of the defendants, their servants or agents in assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic; by the making of their travel arrangements, \textit{or by informing them of the identity and location of and method of communication with a specified clinic or clinics are unlawful, having regard to the provisions of Article 40, s. 3, sub-s. 3 of the Constitution.}\textsuperscript{40}

Having so declared, this Court then ordered

that the defendants and each of them, their servants or agents be perpetually restrained from assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by the making for them of travel arrangements, \textit{or by informing them of the identity and location of and the method of communication with a specified clinic or clinics or otherwise.}\textsuperscript{41}

In the course of his judgment in that case, Chief Justice Finlay, having considered the admitted facts, stated that

I am satisfied beyond doubt that having regard to the admitted facts the defendants were assisting in the ultimate destruction of the life of the unborn by abortion in that they were helping the pregnant woman who had decided upon that option to get in touch with a clinic in Great Britain which would provide the service of abortion. It seems to me to be an inescapable conclusion that if a woman was anxious to obtain an abortion and if she was able by availing of the counselling services of one or other of the defendants to obtain the precise location, address and telephone number of, and method of communication with, a clinic in Great Britain which provided that

\begin{itemize}
\item \textsuperscript{38} Ir. Const. art. 40, § 3(3) (enacted under the Eighth Amendment of the Constitution Act (1983)).
\item \textsuperscript{39} Attorney General v. Open Door Counselling Ltd., 1988 I.R. 593, 621 (Ir. S.C. 1988) (Finlay, C.J.).
\item \textsuperscript{40} \textit{Id.} at 627 (emphasis added).
\item \textsuperscript{41} \textit{Id.} (emphasis added).
\end{itemize}
The following year, SPUC brought a case against a students' union, seeking an order restraining them from publishing a booklet containing information about abortion services in the U.K. In the particular circumstances, including SPUC's role in the *Open Door* case, and considering the nature and objects of the Society, the Supreme Court (four to one) was prepared to allow that SPUC did have legal standing to pursue its case. SPUC sought injunctions against three more students' unions in *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan.* The High Court judge referred the case to the European Court of Justice “for a preliminary ruling on certain aspects of EC law.” Seven months later, the Court of Justice ruled that “it was not contrary to EC law for Ireland to prohibit the [students’ unions] from distributing [abortion] information,” where the clinics themselves are not involved in the said distribution. However, the Court also held that lawful termination of pregnancy is “a service within the meaning of Article 60 of the Treaty of Rome”; therefore, the way was clear under EC law for foreign abortion clinics themselves “to disseminate information in Ireland about the services provided.” The ruling of the Court of Justice provoked an extraordinary political response, in the form of Protocol Number Seventeen to the Treaty on European Union, signed at Maastricht on 7 February 1992. It purported to immunise the Eighth Amendment to the Constitution from any effects EC law might have on its application in Ireland. However, the Protocol was soon overshadowed by events, specifically, the events which culminated in the case of *Attorney General v. X.*

The “X.” of the title was a fourteen-year-old schoolgirl. Following an alleged rape, she found herself pregnant. The girl and her parents concluded that the best course to pursue was to seek an abortion in England. The parents informed the gardaí [police] of this course and also raised with them the possibility of having scientific tests car-

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42. *Id.* at 624.
45. *See* *Kelly,* supra note 37, at 794.
46. *Id.* at 795.
47. *Id.*
48. *See id.* at 795-96.
49. *Id.* at 795 (quoting the language of Protocol No. 17 to the Treaty on European Union).
51. *Id.* at 41 (Finlay, C.J.).
52. *Id.*
53. *Id.*
ried out on the foetus in order to assist in identifying the father.\textsuperscript{54} The police sought the opinion of the Director for Public Prosecutions ("DPP") on whether such evidence would be admissible.\textsuperscript{55} The DPP in turn informed the Attorney General, who applied for and obtained an interim injunction restraining the girl from having or arranging an abortion in Ireland, and preventing her from leaving the jurisdiction for nine months.\textsuperscript{56} At this point the child and her parents were already in England; they cancelled the arrangements for the abortion and returned home to contest the injunction.\textsuperscript{57}

Previous judicial pronouncements in relation to abortion had taken place in the dry atmosphere of theoretical argument; the contrast with this case cannot be overemphasised. Judges and lawyers alike are aware of the maxim "hard cases make bad law," and here was a case that pulled the heartstrings from every angle: a vulnerable, underage girl; sexually violated and impregnated against her will; behaving in obedience to the authorities at all times—even to the extent of returning home and cancelling the abortion appointment. Public sympathy was heightened by the oral evidence of a senior psychologist that she was in a disturbed emotional state, and might commit suicide. Public anger was aroused when it became known that it was her very willingness to help the gardaí that led to the Attorney General bringing proceedings—if the girl and her parents had said nothing, she would not have been stopped. And this time it was not merely the provision of information that was in contention: The State was seeking to restrict her liberty to leave the country.

This was the atmosphere in which the Court had to consider its judgment. The nation waited, and speculated, yet few foresaw the line that the Court took. The Pro-Life movement had sought by the Eighth Amendment to remove abortion from the judicial purview, but of course, once part of the Constitution, the Amendment itself fell to be interpreted solely and exclusively by the judiciary. In a judgment that convulsed the nation, four of the five Supreme Court judges held that, contrary perhaps to popular impression, the Eighth Amendment required that termination of pregnancy be allowed, albeit only where it was "established as a matter of probability" that there was "a real and substantial risk to the life" of the mother if such termination were not effected.\textsuperscript{58} That was controversial enough, but to that, the Court added that "real and substantial risk" was not limited to physical conditions that endangered the mother's life, but could also encompass a psychological imbalance leading to possible suicide.\textsuperscript{59}

\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} See id. at 41-42.
\textsuperscript{57} Id. at 42.
\textsuperscript{58} See id. at 53-54.
\textsuperscript{59} See id. at 55.
By virtue of the enactment of the Eighth Amendment to the Constitution, Article Forty, section three, subsection three of the Constitution provides that "[t]he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." The right to life of the unborn therein referred to is not created by law or by the Constitution; the aforementioned Article merely confirms or acknowledges its existence and gives it protection.

In the course of his judgment in this case, Chief Justice Finlay stated:

I accept the submission made on behalf of the Attorney General, that the doctrine of the harmonious interpretation of the Constitution involves in this case a consideration of constitutional rights and obligations of the mother of the unborn child and the interrelation of those rights and obligations with the rights and obligations of other people and, of course, with the right to life of the unborn child as well.

Such a harmonious interpretation of the Constitution carried out in accordance with concepts of prudence, justice and charity, as they have been explained in the judgment of Walsh J. in McGee v. The Attorney General [1974] I.R. 284 leads me to the conclusion that in vindicating and defending as far as practicable the right of the unborn to life but at the same time giving due regard to the right of the mother to life, the Court must, amongst the matters to be so regarded, concern itself with the position of the mother within a family group, with persons on whom she is dependent, with, in other instances, persons who are dependent upon her and her interaction with other citizens and members of society in the areas in which her activities occur. Having regard to that conclusion, I am satisfied that the test proposed on behalf of the Attorney General that the life of the unborn could only be terminated if it were established that an inevitable or immediate risk to the life of the mother existed, for the avoidance of which a termination of the pregnancy was necessary, insufficiently vindicates the mother's right to life.

I, therefore, conclude that the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40, s. 3, sub-s. 3 of the Constitution.

This was sufficient to dispose of what the Court considered to be "the substantive issue" in the case. In an obiter consideration of the right to travel, Chief Justice Finlay, Justice Egan, and Justice Hederman (who alone dissented on the substantive issue) were of opinion

60. Ir. Const. art. 40, § 3(3).
61. X., 1992 1 I.R. at 53-54 (Finlay, C.J.).
that the right to travel was not absolute, and could not simpliciter take precedence over the right to life: This meant that injunctions restraining travel abroad to procure abortions could be justified. Justice O'Flaherty and Justice McCarthy, on the other hand, rejected such restrictions on travel. The former thought it would interfere to an unwarranted degree with the individual's freedom of movement and with family authority; the latter felt that the court had no jurisdiction to curtail the right to travel on the basis of an intention, even if that intention were to commit a crime in another jurisdiction.

Justice McCarthy was particularly incensed at what he perceived as a consistent failure to legislate in the area of abortion. He let his dissatisfaction be known in his judgment, saying:

In the context of the eight years that have passed since the Amendment was adopted ... the failure by the legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable. What are pregnant women to do? What are the parents of a pregnant girl under age to do? What are the medical profession to do? They have no guidelines save what may be gleaned from the judgments in this case. What additional considerations are there? Is the victim of rape, statutory or otherwise, or the victim of incest, finding herself pregnant, to be assessed in a manner different from others? The Amendment, born of public disquiet, historically divisive of our people, guaranteeing in its laws to respect and by its laws to defend the right to life of the unborn, remains bare of legislative direction.

As a result of the cumulative effect of these decisions, the position was that:

(1) "if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible;"

(2) the dissemination of information with regard to abortion services available outside the State was unlawful; and

(3) travel abroad for the purpose of obtaining an abortion was unlawful and could be restrained.

In an effort to deal with these issues, three proposed amendments to the Constitution were submitted to the people on 25 November 1992.
Two of these amendments were passed; these dealt with the freedom to travel and information relating to services lawfully available.68 The one which was not passed was in the following terms:

It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction.69

The risk of self-destruction had been the ground upon which the Supreme Court in the X case had held the termination of pregnancy to be permissible.

Consequently, the rights as laid down by the Supreme Court in this case [Attorney General v. X.] prevail as no legislation dealing with the situation has been enacted by our Legislature.

The Legislature did, however, introduce legislation dealing with the regulation of information relating to services outside the State for the termination of pregnancies, and the provisions of this legislation were referred by the President to the Supreme Court for a determination by it as to whether or not any provision thereof was invalid having regard to the provisions of the Constitution, and the Supreme Court held that it was not.70

By the time the Oireachtas had passed the bill regulating information on foreign abortion services, a new case71 (and with it a new moral dilemma) was seizing the headlines. Once again, the courts were placed in a cauldron of emotion and passionate public debate, and asked to rule on the outer limits of the right to life, and the State's duty to preserve life. The facts were simple: A twenty-two-year-old woman had suffered three massive heart attacks during the course of a minor operation for which she had been given a general anaesthetic.72 From that time, she had been in a near-persistent vegetative state ("PVS"), kept alive by artificial nutrition and hydration.73 In 1995, the woman was forty-five years old. She had remained in the same state, on life support, for twenty-three years. Her mother and brothers took the view that she should be allowed to die, by the removal of the artificial feeding mechanisms.74 As the woman was a ward of court, however, it was necessary to apply to the High Court for a di-

68. Id.
72. Id. (Hamilton, C.J.).
73. Id. at 402.
74. Id.
rection to this effect.\textsuperscript{75} There, it was found as fact that, while the ward was not in a permanent vegetative state, "she was very nearly so and such cognitive capacity as she possessed was extremely minimal."\textsuperscript{76} The High Court judge elaborated as follows:

A fully PVS person cannot feel pain and has no capacity for pleasure or displeasure even though they may groan or grimace or cry, especially in response to painful stimuli, nor have they any realisation whatever of their tragic situation. This is probably the ward's state but if such minimal cognition as she has includes an inkling of her catastrophic condition, then I am satisfied that that would be a terrible torment to her and her situation would be worse than if she were fully PVS. There is no prospect whatsoever of any improvement in the condition of the ward.\textsuperscript{77}

On 5 May 1995, Justice Lynch granted the order sought by the ward's mother.\textsuperscript{78} His decision was appealed by the Attorney General, the General Solicitor for Minors and Wards of Court who had been appointed her guardian \textit{ad litem}, and the institution which had been caring for her.\textsuperscript{79}

Leaving aside the question of court jurisdiction, the central issue that faced myself and the other judges of the Supreme Court was this: In speaking of the "right to life," what do we mean? What constitutes "life" in this context? It seemed clear to me then, as it does now, that:

As the process of dying is part, and an ultimate inevitable consequence, of life, the right to life necessarily implies the right to have nature take its course and to die a natural death and, unless the individual concerned so wishes, not to have life artificially maintained by the provision of nourishment by abnormal artificial means, which have no curative effect and which are intended merely to prolong life.\textsuperscript{80}

This right as so defined does not include the right to have life terminated or death accelerated and is confined to the natural process of dying. No person has the right to terminate or have terminated his or her life or to accelerate or have accelerated his or her death.

Euthanasia is not an acceptable concept in Irish constitutional jurisprudence. There is a difference between positive acts designed to end life, and the withdrawal of invasive medical treatment in order to allow nature to take its course. The right of a competent person to refuse medical treatment is not in doubt and it was the opinion of a majority of the Supreme Court that the ward had a similar right, excepting that the decision to refuse or not fell to the Court, exercising

\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 412-13 (citing High Court opinion of Justice Lynch).
\textsuperscript{78} Id. at 414 (Hamilton, C.J.).
\textsuperscript{79} Id. at 413-14.
\textsuperscript{80} Id. at 426.
its discretion on her behalf, as she could not do so herself. It follows
naturally that in so doing, the Court had paramount regard to the best
interests of the ward herself. In this case, I and three other judges
were of the opinion that her best interest lay in being allowed to
die\textsuperscript{81}—as the High Court judge had ordered.

Once again, this was a case which elicited considerable controversy.
Identifying the proper legal and ethical boundaries of personal rights
is never easy, particularly when matters of life and death are in issue.
Nevertheless, such judgments must be made; lines have to be drawn.
And although division may result, it is essential to the health of a plu-
ralist society with a concern for human rights that such matters are
raised, and brought to public attention. For perhaps the first time in
Ireland, the Ward of Court case forced people into a conscious consid-
eration of the new ethical problems being thrown up by our exponen-
tially increasing technological ability. These problems will not go
away, anymore than the technology which brought them into being
will be “uninvented.” As long ago as 1963, Martin Luther King
warned western humanity: “The means by which we live have outdis-
tanced the ends for which we live. Our scientific power has outrun
our spiritual power.”\textsuperscript{82}

In considering these and other problems relating to life, the quality
of life, and the role of the State in protecting it, the basic philosophical
tools are already to hand: It is for the Court, and indeed for every
citizen, to mould their understanding of fundamental human rights
concepts in order to apply them to new situations. I have no doubt
but that it is for the legislative organ of the State to decide the broader
issues, including the redefinition of death. In the absence of such leg-
islation, it is a matter for the courts to decide, when the issue is raised
in proceedings before them: The issue cannot be avoided or ducked.
I would echo the words of William Binchy, Professor of Law at Trinity
College, Dublin, in which he challenges us not to bury our heads in
the sand, but rather to face the moral and legal storms ahead, saying:

I believe that in contemporary Ireland this is precisely the time
when these questions should be examined afresh. We live in an ex-
citng period when all the old orthodoxies have come under close
scrutiny and debate. Without revitalisation and fresh endorsement,
there would be a real danger that a society’s value system might in
time harden into a desiccated orthodoxy and come to be regarded
merely as an external imposition of restrictive rules. The process of
open debate and reconsideration creates an opportunity for new in-
sights as well as a revitalised commitment to those values whose
true worth may have become hidden from view.\textsuperscript{83}

\textsuperscript{81} \textit{Id.} at 429-30; \textit{id.} at 435 (O’Flaherty, J.); \textit{id.} at 443 (Blayney, J.); \textit{id.} at 465-66
(Denham, J.).

\textsuperscript{82} Martin Luther King, Strength to Love 74 (First Fortress Press 1981) (1963).

\textsuperscript{83} William Binchy, Pluralism, Liberty and the Right to Life, in Law and Liberty in