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Informed Consent Without Autonomy

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Daniel P. Sulmasy

Abstract

This Essay explains why and how the Roman Catholic basis for informed consent is different from the secular basis. It argues that the Catholic basis, which is rooted in “natural law,” is the better model for society to adopt. The author explains that the secular view is rooted in the belief that patient autonomy must never be violated but the Catholic view is based on human dignity, which simply requires doctors to allow patients to exercise their free will within moral limits. This view allows doctors to override patients’ decisions if those decisions are morally wrong or irrational.

KEYWORDS: informed consent, ethics, religion, Catholic, morals, bioethics

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INFORMED CONSENT WITHOUT AUTONOMY

*Daniel P. Sulmasy**

A HYPOTHETICAL CASE

Mrs. Mary Carpenter has experienced post-menopausal vaginal bleeding. Her gynecologist, Dr. John, diagnosed endometrial cancer and recommended a hysterectomy. She and her husband, Joe, go to visit Dr. John at his office at Good Samaritan Catholic Hospital to discuss their options. Dr. John explains the indications for the procedure, the nature of the procedure, the risks and benefits, and the alternatives, including second opinions and not having the procedure. In order to ensure that Mary and Joe have understood everything, Dr. John asks them to repeat back what they have heard. After they take a moment to discuss it among themselves, Mary signs the informed consent form, and they make plans for the operation.

INTRODUCTION

Although scenarios like this one occur routinely throughout the United States at Catholic hospitals, public hospitals, for-profit hospitals, and not-for-profit hospitals, no one knows how often the process is conducted properly. It would seem that the same steps would be taken in each of the above settings since the Ethical and Religious Directives for Catholic Health Care require informed consent, just as secular ethics and law do.¹ Consequently, it might also seem as if the question of whether there is anything distinctive about Catholic medical ethics and informed consent is really a non-question.

However, I want to suggest that while it may superficially appear that there is nothing distinctive about a Catholic approach to informed consent, the practice of informed consent in Catholic and secular settings may really be similar only by *homology* and not by

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1. See U.S. Bishops' Meeting, *Ethical and Religious Directives for Catholic Health Care Services*, 31 *ORIGINS* 153, 158-59 (2001); see also JESSICA W. BERG ET AL., *INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE* 46-47 (2d ed. 2001); RUTH R. FADEN ET AL., *A HISTORY AND THEORY OF INFORMED CONSENT* 25-26, 125 (1986).

phylogeny.² That is to say, the two practices may look the same, but the explanation, origin, and development of informed consent is really very different in Catholic and secular thought. These differences, thankfully for the sake of social harmony, are only apparent at the extreme edges of case analysis. However, because there are occasionally difficult cases, it is worthwhile to understand the distinctions. Furthermore, because the substance of each approach is essentially different, they cannot both be correct.

In this Essay, I will attempt to accomplish two things. First, I will explain why and how the basis for the practice of informed consent in the context of Roman Catholic thought differs from the common secular justification. Second, because Catholic moral thought uses the natural law tradition, I will argue that, philosophically, the justification that I offer is actually the correct one and, consequently, the better one for secular society to adopt. These arguments can be made independently of any explicitly religious assumptions.

I. THE COMMONLY HELD VIEW

The “received,” or commonly held, view is that informed consent is an obligation of physicians and other health care professionals founded upon respect for autonomy.³ Autonomy, in turn, is generally defined as the ability of the individual to be self-determining, to make choices according to her own views, and to determine for herself what is good.⁴ This sort of thinking seems to undergird Justice Benjamin Cardozo’s famous quote about informed consent: “Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault”⁵ Under the commonly held view, this applies to Mrs. Schloendorff, the plaintiff alluded to by Cardozo, as well as to the Mary Carpenters of the world.

This is also the view put forth in the contemporary bioethics literature on the ethical justifications for the practice of informed consent. For example, Berg and her co-authors state that, “[t]he values underlying informed consent [are] autonomy and concern

2. The biological terms are used here to metaphorically signify two entities that have the same appearance and function, but have developed via different evolutionary paths.

3. See BERG ET AL., *supra* note 1, at 11; see also FADEN ET AL., *supra* note 1, at 25.

4. See FADEN ET AL., *supra* note 1, at 7-9.

5. *Schloendorff v. Soc. of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914), *overruled on other grounds* by *Bing v. Thinig*, 143 N.E.2d 3, 7-8 (N.Y. 1957).

for individual well-being.”⁶ They contend that the moral theory undergirding this view is that “[p]ersons can exercise their wills, their self-ruling capacities, their autonomy.”⁷ Ultimately, they define well-being in terms of autonomy: “[i]n most cases, including most healthcare contexts, respect for an individual’s autonomy coincides with promotion of her well-being. So long as an individual decides in the light of adequate information, and chooses freely, she will act to promote her *subjective* well-being, her well-being as she herself defines it.”⁸

Similarly, Faden and Beauchamp, while offering a theory of autonomous choices rather than autonomous persons, still base the ethical justification of informed consent upon the theory of autonomy.⁹ They state flatly that, “the obligation to obtain informed consent in research and clinical settings is generally understood to be grounded in a principle of respect for autonomy”¹⁰ They offer the following explanation of what this means: “[t]o respect an autonomous agent is to recognize with due appreciation that person’s capacities and perspective, including his or her right to hold certain views, to make certain choices, and to take certain actions based on personal values and beliefs.”¹¹

Admittedly, the foregoing is merely a sketch that does not do complete justice to the complex theories of rational choice, autonomy, and autonomous action that many scholars have offered. However, to a first approximation, the commonly held view is that we have a moral obligation in medicine to elicit informed consent because the way we show respect for people is to respect their ability to choose for themselves, to determine themselves, and to define “the good” for themselves. Furthermore, because an individual’s free choice defines what we mean by the good, to deny the patient free choice is fundamentally a moral wrong because it frustrates, rather than promotes, the good of the patient. The only legitimate moral limit on the free choice that defines the individual good is the patient’s obligation to refrain from limiting the free choices of other persons.

By contrast, I suggest that traditional Roman Catholic natural law thinking has supported the notion of informed consent for cen-

6. BERG ET AL., *supra* note 1, at 14.

7. *Id.* at 22.

8. *Id.* at 24.

9. See FADEN ET AL., *supra* note 1, at 8.

10. *Id.* at 9.

11. *Id.* at 8.

turies, based on theoretical considerations other than autonomy, even before Immanuel Kant invented the word.¹² I will argue that this theoretical justification for the practice of informed consent is sound and largely squares with our present practices, but escapes the objections that are presently being raised against the autonomy-based theories of medical ethics and informed consent that have just been briefly described.

II. HUMAN NATURE AND HUMAN DIGNITY

Natural law theory begins with reflection upon human nature.¹³ In fact, all theories of human morality have at least an implicit view of human nature (or a philosophical anthropology as it is sometimes called). Natural law appears to stand out simply because it is explicit about this. In regard to the theory of informed consent, it is sufficient to say that natural law assumes that human beings are a natural kind that is embodied (viz., they are mammals), capable of free choice and reason,¹⁴ and are essentially social-beings-in-re-relationship.¹⁵ In traditional Roman Catholic theology, the latter three characteristics are what constitute the *Imago Dei*, or Image of God.¹⁶ Human beings are made in God's image because they are, as a natural kind, freely willing, reasoning, and essentially relational.¹⁷ In Catholic theology, human beings have intrinsic dignity because they are made in the image and likeness of God. This attribute gives each human being, as a member of this natural kind, special worth or value compared with other entities in the universe.

One need not believe in God, however, to believe that human beings have intrinsic human dignity. All one needs to accept is that the special capacities for free choice and reason and the essential relationality that are characteristic of the human natural kind are sufficient to explain why each human has a special worth or intrinsic dignity. Even more simply, as J. David Velleman has put it, a person's interests are worth protecting only for the sake of the per-

12. See J.B. SCHNEEWIND, *THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY* 3 (1998).

13. See Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y. 655, 665 (1997).

14. See Henry Mather, *Natural Law and Liberalism*, 52 S.C. L. REV. 331, 354 (2001).

15. See Barnett, *supra* note 13, at 657.

16. See *Gaudium et Spes* ¶ 12-18, in VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 903, 913 (Austin Flannery, O.P., ed. 1975).

17. See *id.* at 913-18.

son whose interests they are.¹⁸ Intrinsic dignity is this “interest-independent value” of a person.

Thus, intrinsic human dignity is not, as is sometimes supposed in less careful but common contemporary formulations, synonymous with the exercise of free choice by individuals unencumbered by external constraint.¹⁹ In traditional natural law thinking, dignity is concerned with the *capacity* for free choice as one among several features that are characteristic of the human as a natural kind, not with the individual *exercise* of free choice.²⁰ Intrinsic human dignity is thus characteristic of all members of the human natural kind, even those rendered incapable of exercising free choice by disease or injury or restrained from exercising free choice by other human beings or by natural forces.

In traditional natural law thinking, the exercise of human free choice is respected, within the bounds of good social order, because members of the human natural kind have this capacity as part of their intrinsic dignity.²¹ Secular thinking sometimes appears to have this confused, and attributes dignity to human beings to the extent that they are actually exercising or capable of exercising free choice as individuals, unencumbered by external control.²² However, even Ronald Dworkin ultimately concedes that at the heart of any rights theory is a concept of human dignity that belongs to the human natural kind, and is independent of the exercise of free choice by individuals. He writes:

Anyone who professes to take rights seriously . . . must have some idea of what the point is. He must accept, at a minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust. The second is the more familiar idea of political equality.²³

18. See J. David Velleman, *A Right of Self-Termination?*, 109 ETHICS 606, 611 (1999).

19. See *Gaudium et Spes*, *supra* note 16, at 917.

20. See Robert P. George, *Reason, Freedom and the Rule of Law: Their Significance in the Natural Law Tradition*, 46 AM. J. JURIS. 249, 255 (2001).

21. See John M. A. Di Pipp & Lon Fuller, *The Model Code and the Model Rules*, 37 S. TEX. L. REV. 303, 316 (1996).

22. See *Gaudium et Spes*, *supra* note 16, at 915-16.

23. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 198-99 (1977).

In the natural law view, the capacity for free choice is but one among a cluster of several species characteristics that confer dignity upon the human natural kind.²⁴ Morally, this dignity commands our respect. In a strong sense, since it belongs equally to all individual members of the human natural kind, equality is really a corollary of dignity.

III. FREEDOM AND GOODNESS

Next, natural law theory holds that things are chosen because they are good, and not good because they are chosen.²⁵ Under this view, it is characteristic of the members of this free-willing, rational, relational, and embodied natural kind that they choose what they perceive to be good. An individual human being may be right or wrong in the belief that something is good.²⁶ She may be mistaken in her view about the good, or may suffer from weakness of the will, and freely choose something she believes is not good. However, it is of critical importance to note that what an individual chooses is not good merely by virtue of its having been chosen. Contemporary ethics sometimes seems to suggest the absurd notion that what makes an act of mine good is merely that I have chosen it—my well-being as I have defined it. Under this view, the good is what I think is good for me, as I choose it, after accumulating all the facts, purging all illicit influences upon my autonomous will through rational psychotherapy, and finally conferring goodness upon my action by investing it with all my authenticity.

That this popular notion of the good is clearly wrong should be painfully obvious. After all, the people who crashed their planes into the World Trade Center thought they were doing good. They were very authentic. They freely chose to do what they did after protracted study, and do not appear to have suffered from any mental illness. They chose the good as they sincerely saw it. None of these things, I suggest, are sufficient to make a human act good or right.

Nor is it sufficient to say that the good is whatever I freely choose, provided it does not limit the free choices of others. If a sane, wealthy man were to choose to invest all his personal resources, will, and authenticity into a lifetime's mission of picking

24. See Mather, *supra* note 14, at 347.

25. See Kevin L. Flannerty S.J., *Natural Law Mens Rea Versus the Benthamite Tradition*, 40 AM. J. JURIS. 377, 387 (1995).

26. See Mather, *supra* note 14, at 334.

blades of grass in Central Park, it would be absurd to call such a life good although this man would have harmed no one.

Free choice is the *context* of morality, not the *content* of morality. By context I mean that no theory of moral action is possible without presupposing some version of free will. If human beings do not make free choices, then they cannot be held responsible for what they do and no human deed can be considered worthy of praise or blame. However, the exercise of free choice is hardly the essential content of morality. In the end, maximizing net preference satisfaction is an absurd notion of the good. The aim of moral theory ought to be to help people better to understand what really *is* good so that they may freely choose it. The aim is not to help people to choose more or to help more people to choose, except in the sense that people must first be free to choose if they are to be held morally accountable for choosing the good.

IV. INFORMED CONSENT AND NATURAL LAW

If what I have said is true, then the common contemporary justifications for informed consent are based upon a view of autonomy imbued with confused notions of freedom and morality. How is it then that natural law, while rejecting this common notion of autonomy, nonetheless supports the notion of informed consent in health care? I would suggest the following reasons why natural law theory justifies, and, in fact, requires, a practice of informed consent that appears very homologous to its confused contemporary cousin.

A. Free Will

First, inasmuch as free will is essential to the nature of human beings, and constitutes part of the core reason why this particular natural kind has intrinsic dignity, then human beings ought to allow each other, within the bounds of good social order, the opportunity to choose the good freely. The difference between this conception and the contemporary autonomist justification for the practice of informed consent may appear subtle, but is, in fact, quite significant. On the natural law view, human beings do not define their well-being for themselves by the mere act of choosing.²⁷ Therefore, it is not the case that any and all interference in the free choice of a patient is a transgression against the good of the pa-

27. Mather, *supra* note 14, at 335; *see also* W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113, 147-48 (2000).

tient. Rather, on this view, patients are first and foremost human beings, and as such, they are members of a natural kind that is embodied, relational, free willing, and endowed with reason. To respect them for the dignity that comes from membership in this special natural kind requires respect for the exercise of their freedom, within the limits set by respect for all the other aspects of their nature.

This is not an uncommon logic. For example, one reason why I might value a Model-T Ford is that it is a driving machine—a machine with the capacity to be driven. This means that driving it is generally a good thing. This does *not* mean that, in order to demonstrate my respect for this value, I must always drive it, that there might not be good reasons to refrain from driving it, or that it does not matter where I drive. Nor does it mean that the car ceases to have value as a member of the driving machine class, even if the individual Model-T has lost the capacity to be driven, and, for example, has been placed in a museum.

Moreover, Catholics recognize that God allows His human creatures to exercise the freedom with which He endowed them. It would be pointless to give them this capacity and then rob them of it by forcing them always to do His will. This does not mean that what human beings choose is good by definition. It means simply that it is natural and good for human beings to make free choices, and within bounds, they ought to be allowed to do so by their fellow human beings out of deference to God's will that human beings should willingly choose the good. Thus, informed consent is respectful of the dignity of God, as well as that of human beings.

B. Human Diversity

Second, members of the human natural kind, by virtue of being embodied biological entities of the class *Mammalia*, are essentially diverse. For example, pain thresholds vary, skin thickness varies, and bowel motility varies. Human beings are also essentially relational, and these relationships have immensely variable histories and diversity. Given the variety that is essential to the human as a biological, relational natural kind, it stands to reason that patients provide the most important data in making medical decisions, and that only they can have experiential, individual, epistemic access to this information.

However, the fact that pain thresholds vary does not mean that the good is subjective. To do good for individual patients simply

depends upon recognizing the variability among individual patients. In this sense, informed consent is only natural.

C. The Imprecise Nature of Morality

Third, morality itself is inherently imprecise. As Aristotle stated: "we do not look for the same degree of exactness in all areas, but the degree that fits the subject-matter in each area and is proper to the investigation."²⁸ Therefore, it would be very improper for a clinician to claim super-human expertise in the moral aspects of health care and sufficiently precise knowledge of the best course of action in each case to force the patient into conformance with the doctor's wishes. Thus understood, informed consent would not be grounded in pure subjectivity. It is not the case that what the patient believes is good, is good simply by virtue of the patient's passionate belief. Rather, on this view, the justification for informed consent is partly grounded in what may be called epistemic moral humility. That is to say, we must humbly admit that sometimes we simply cannot be sure what is right or good, and that, under such circumstances, it would be wrong for a physician to force a patient to do something to which the patient objects if the patient has at least as much moral certitude (or lack thereof) as the physician. The religious way of justifying informed consent in this manner would be to remind the physician that "M.D." does not stand for "Medical Deity."

D. The Practical Nature of Morality

Fourth, morality is the most practical of all the branches of philosophy, and, as Aristotle also succinctly noted, practical wisdom is concerned with action.²⁹ The controlling virtue of medical practice, as in Aristotelian ethics, is practical wisdom, or *phronesis*. The simple, practical truth is this: unwilling patients are not good patients.

Without the cooperation of the patient, the physician can usually accomplish very little. Even if one were to render a patient unconscious and perform surgery, the post-operative course would be risky and complicated without the patient's cooperation. Natural law ethics is practical, and, practically speaking, informed consent is wise. Even the notoriously paternalistic Hippocratic physician

28. ARISTOTLE, *NICOMACHEAN ETHICS* 18 (Terence Irwin trans., Hackett Pub. Co. 1985).

29. *Id.* at 159.

would have conceded that, in order to secure the patient's cooperation, she had to at least occasionally explain to the patient why his commands needed to be followed.³⁰ In fact, the end of the famous first aphorism of Hippocrates states, "[t]he physician must be ready, not only to do his duty himself, but also to secure the cooperation of the patient."³¹

Consequently, I believe that one can justify the practice of informed consent without relying on the common version of respect for autonomy which claims that the good is what I freely will, and any limit imposed upon my free will is evil, unless my choice impinges on the free will of another. Rather, the practice of informed consent can be justified by simply pointing out that for a physician to respect patients as dignified human beings, she must, within moral limits, allow patients to exercise free choice. Human beings are also highly variable, and only patients can truly assess medical benefits and burdens for themselves. The process of informed consent allows this to happen. Epistemic moral humility requires physicians to recognize that they will often be unsure of the morally correct action, and, therefore, will have no particular warrant for claiming that their own moral judgments are better than those of their patients. Finally, as a practical matter, since informed and willing patients make better patients, informed consent can help to secure a better outcome.

V. THE REFUSAL OF MEDICAL TREATMENT IN HISTORICAL CATHOLIC THEOLOGY

Before Kant invented the word, and within a religion that can still make little sense of the contemporary concept of autonomy, Sixteenth Century theologians developed the theology of the forgoing of extraordinary means of medical care.³² While not as robust as the contemporary practice of informed consent, their view was a theology of informed refusal—a theological justification for the practice of allowing patients to disobey the orders of their doctors, and to forgo prescribed medical treatment. For example, the Sixteenth Century Dominican, Vitoria, wrote, "I say that one is not

30. LUDWIG EDELSTEIN, *The Hippocratic Physician, in ANCIENT MEDICINE: SELECTED PAPERS OF LUDWIG EDELSTEIN* 99 (Owsei Temkin & C. Lilian Temkin eds., Johns Hopkins Univ. Press 1967).

31. HIPPOCRATES, *Aphorisms I*, in IV HIPPOCRATES 99 (W.H.S. Jones trans., Harvard Univ. Press 1992).

32. See Daniel A. Cronin, *The Moral Law in Regard to the Ordinary and Extraordinary Means of Conserving Human Life*, in CONSERVING HUMAN LIFE 36-37 (Russell E. Smith ed., 1989).

held to lengthen his life because he is not held to use always the most delicate foods Granted that the doctor advises him to eat chickens and partridges, he can eat eggs and other common items.”³³ Similarly, Dominic Soto, another Sixteenth Century Dominican, wrote, “no one can be forced to bear the tremendous pain in the amputation of a member or in an incision into the body: because no one is held to preserve his life with such torture.”³⁴

It seems to me that this is informed consent without the modern notion of autonomy. Priests advised patients that it was morally permissible to refuse medical recommendations. In the extraordinary means tradition, it has long been understood that the task of the clinician was to inform the patient, the patient’s family, or both, of the potential benefits and burdens, and the task of the patient or family was to weigh these and to decide.

A. Implications

Since the practice of informed consent under the natural law view would seem so similar to the common, autonomist conception of informed consent, it is important to examine some of the cases at the edges in which these two views would prescribe different approaches. The fact that the common legal view and the natural law view of informed consent in health care would provide different answers in these circumstances has many implications.

B. Treatment Decisions

Under the natural law view, health care professionals would not be violating human dignity by placing greater moral limits on patient choices than the mere prohibition of choices limiting the freedom of others. The clinical practice of informed consent under the natural law justification would defer broadly, but not absolutely, to the free choices of individuals. Provided that their choices do not endanger basic moral values such as intrinsic human dignity, life, family, and the common good, patients would be free to choose the good and even to make mistakes. However, one can easily imagine cases in which patients’ choices might violate their status as members of an embodied, rational, and relational natural kind, threatening the meaning and integrity of human dignity or the common good, even though their choices might not limit the liberty of others. Under the natural law view, these patients could be chal-

33. *Id.* at 37.

34. *Id.* at 38.

lenged or their behavior could be limited in ways that current law and bioethical thinking would not support.

For example, suppose an otherwise healthy eighteen year-old, newly diagnosed diabetic decides that the burdens of taking insulin every day for the rest of her life outweigh the benefits, and that she wants to stop taking insulin, knowing that she will die without it. This decision would apparently not harm anyone else or restrict anyone else's liberty. If her choice were serious, sincere, and persistent, and there was no mental illness, the law would require that such a choice be honored. Natural law, however, would suggest that this eighteen year-old member of a free-willing, embodied, relational, and rational natural kind is not the sole judge of her own good. As an essentially relational being, the community could tell her that this judgment is outside the bounds of practical rationality, outside the broad range of acceptable and justifiable deference to the free choice of individuals, and a violation of her essential status as an embodied and living member of a dignified natural kind. She might, for instance, be forced to take insulin until she learned enough ethics to realize that taking insulin is the right thing to do in such a case.

Furthermore, informed consent would not be sufficient to justify euthanasia or assisted suicide, because the good of the patient would not be defined simply by the patient's own choice. Such an act would be considered irrational in the sense that it would intentionally dispose of the interest-independent value of the patient which constitutes her dignity and provides the reason that any of her free choices ought to be respected in the first place.³⁵ As an essentially relational being, the patient could also be reminded that suicide is never actually private since it also affects the community that contributes to the patient's nature and her dignity. As essentially embodied, the suicidal patient would be judged as having decided intentionally to destroy the condition necessary for the possibility of good, namely being alive, and so would be acting directly against the value of life. For these reasons, informed consent would never, under the natural law view, justify assisted suicide or euthanasia. Yet the law in the Netherlands, and in the state of Oregon takes the opposite view.³⁶

35. Velleman, *supra* note 18, at 6.

36. Oregon Death With Dignity Act, OR. REV. STAT. § 127.805 (2.01) (1994); Penney Lewis, *Rights Discourse and Assisted Suicide*, 27 AM. J.L. & MED. 45, 47-48 (2001); Marlise Simons, *Netherlands Becoming First Nation to Legalize Assisted Suicide*, N.Y. TIMES, Nov. 29, 2000, at A3.

Finally, the natural law view of informed consent would be very sympathetic, in extreme cases, to the involuntary use of neuroleptics in chronic schizophrenics who refuse to consent to treatment. In the proper consent context, an unhappily psychotic patient who presented no threat to others, but could be restored to near normal mental functioning with the use of neuroleptic drugs, could be forced, for instance, to undergo monthly fluphenazine decanoate injection. This would not be a violation of the patient's essential dignity, and might even be construed as an attempt to show greater respect for her dignity, because her own will would not suffice to define her good. Current legal theory and judicial practices do not allow this.³⁷

C. Substituted Judgment

Under the natural law view of informed consent, when patients can no longer choose for themselves (due, for example, to coma or dementia), one would not need to depend upon the elaborate fiction of substituted judgment to preserve their dignity. Since natural law does not hold that patients' dignity is completely represented by their autonomy, it would not be necessary to ask the family to answer the complex and contrary-to-fact conditional, "What would your mother have told us if she were able to speak?," in order to obtain informed consent in a manner respectful of the dignity of the patient. It is known empirically that family members have a hard time providing substituted judgments, and are often inaccurate.³⁸

Under the natural law view, one turns to the family because the patient's dignity is partly constituted by her essential relationship with them. Family members can exercise practical reason on the patient's behalf, in concert with the health care professionals. They know better than the doctor what the patient's choices are likely to be, and what the patient's judgments might be in reference to pain and risk-taking. The physician cannot claim better epistemic access to moral truth in the face of the moral uncertainty that surrounds most end-of-life decisions.

37. See *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982); *Mills v. Rogers*, 457 U.S. 291, 299 (1982); Michael Leonard Goff, Jr., *Protecting Our Mentally Ill: A Critique of the Role of Indiana State Courts in Protecting Involuntarily Committed Mental Patients' Right to Refuse Medication*, 76 IND. L.J. 983, 983 (2001).

38. See, e.g., Daniel P. Sulmasy et al., *The Accuracy of Substituted Judgments in Patients with Terminal Diagnoses*, 128 ANNALS INTERNAL MED. 621, 626 (1998).

Deciding for others is a very complex task. Clinically, despite ethical and legal theory to the contrary,³⁹ medical decision making for patients unable to speak for themselves is generally a messy mixture of best interests, substituted judgment, and more. It is not the "Vulcan mind meld" of pure substituted judgment.

Natural law turns naturally to the family to provide informed consent for the incapacitated patient. While the current law commands that they provide a substituted judgment, natural law would reject such a one-size-fits-all approach. The glaring failure of the advance directive project might be remedied by adopting the more nuanced natural law approach to informed consent.

CONCLUSION

In summary, in this brief Essay, I have argued that Roman Catholicism's natural law tradition would provide a vigorous justification for the practice of informed consent in health care while avoiding the pitfalls of the pure autonomist justification. Since the natural law argument can be made with or without Catholic faith assumptions, it can be recommended as a superior approach for secular society as a whole.

39. See generally ALLEN E. BUCHANAN & DAN W. BROCK, *DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING* (1989); Roger B. Dworkin, *Medical Law and Ethics in the Post-Autonomy Age*, 68 *IND. L.J.* 727 (1993); Leslie Pickering Francis, *Decision Making at the End of Life: Patients with Alzheimer's or Other Dementias*, 35 *GA. L. REV.* 539 (2001).