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LESAR DISTINGUISHED LECTURE

THE “VALUE OF HUMAN LIFE” AND “THE RIGHT TO DEATH”: SOME REFLECTIONS ON CRUZAN AND RONALD DWORKIN

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These reflections focus on three members (one professor and two alumni) of my Oxford college. Though University College officially bears the name The Great Hall of the University of Oxford, it is only one of that university's 30 colleges, and not a particularly large one—only about 450 students and teaching fellows like myself. My title's focus on one named law professor may already seem narrow. How then, you may wonder, can adding two more names from the same little institution in England make this lecture less parochial, and more relevant to Southern Illinois?

I

The narrow legal issue before the United States Supreme Court in *Cruzan v. Director, Missouri Department of Health*¹ was no more than: Is Missouri entitled to require “clear and convincing evidence” before allowing the withdrawal of food and water from a comatose patient, that is, “clear and convincing, inherently reliable evidence” that the patient would have wished life-sustaining measures to be withdrawn, or wished that such measures would be withdrawn if he or she were later to be in a condition such as he or she actually is now in?

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1. 497 U.S. 261 (1990).

The five Justices comprising the majority say Yes; the minority say No. The minority contends that a state cannot require "clear and convincing, inherently reliable evidence" of those wishes; states can require no more than "reliable evidence" of such wishes. As one reads the minority judgments, however, one is struck by their calm, tacit assumption that there *was* clear and convincing evidence; they read as if their authors *knew* what Nancy Cruzan's wishes and interests were.

Be that as it may, the premises for the minority judgments' rejection of the State's requirement of "clear and convincing evidence" are three propositions, two expressed and one implied:

(1) that one has a right to refuse unwanted medical treatment, and a right to be free from the indignities involved in being comatose (or very ill, "steeped in decay" per Brennan J.),² and

(2) that one will be denied those rights and interests if there is any significant hurdle to the withdrawal of food and water—together with the implied proposition

(3) that there are, on the other side, *no significant* rights or interests calling for protection by such a hurdle or onus of proof, because a comatose person has no interest in life, or her life has expired (Stevens J.),³ or her life is of no legitimate interest to the State "until it is established that this [providing life-saving treatment] represents her choice" (Brennan J.).⁴ The implication of this third premise of the minority is that the State should stand neutral between choosing to sustain human life and choosing precisely to suppress it, neutral as between choosing what is humanly speaking a bad (in this case, death) and choosing an instance of a substantive and very basic human good (in this case, life).

Such demands for neutrality are of far-reaching importance. In *Planned Parenthood v. Casey*,⁵ the Court (O'Connor, Kennedy, and Souter JJ)⁶ repeatedly claims the authority of a line of cases upholding a right described as: to make choices central to one's personal autonomy. The line of Supreme Court decisions named begins in 1923 with *Meyer v. Nebraska*, and runs through *Pierce v. Society of Sisters* in 1925, *Skinner v. Oklahoma* in 1941, and the dissenting

2. *Id.* at 309.

3. *Id.* at 351.

4. *Id.* at 317.

5. 112 S. Ct. 2791 (1992).

6. Souter J. is an alumnus of a college 200 yards down the High Street from mine.

judgment of Justice Harlan in *Poe v. Ullman* in 1961, before reaching *Griswold v. Connecticut* in 1965, and *Eisenstadt v. Baird* in 1971, shortly before *Roe v. Wade*⁷ in 1973. But a historian, or a foreigner, reading these cases in sequence can instantly see that the decisions before 1965 utterly reject the conception that the state, or the law, must stand neutral before choices involving the fostering and respecting or harming and contemning of great human goods, such as education in good and useful knowledge (in the cases from the 1920s), or procreation within marriage (in *Skinner* in 1941), or marriage itself (in Harlan's notable dissent in 1961 and even, still, just, in *Griswold* itself).

True, what those cases all have in common with the post-1965 cases down to *Casey* itself is that they identify implicit or textually unspecified constitutional rights and immunities. But quite unlike the later cases, they do so by reference to goods central to a human person's and community's existence, and honored in the traditions of your community (and mine): knowledge as opposed to ignorance, conjugal procreation as opposed to sterility, conjugal intercourse as opposed to casual or uncommitted sex. With all this the Court broke in *Eisenstadt v. Baird*,⁸ by assuming a double symmetry (or neutrality): (i) what is true of sexual relations that express and support a mutual commitment which makes possible a good environment for the emergence and development of children must equally, and *obviously*, be true of even the most casual one-night stand; and (ii) what is true of the decision to try to have a child must be true of the decision not to have a child. There is just a single neutral category: "the decision [of the *individual*, whether married or single] . . . whether to bear or beget a child."⁹ The key word is "whether." What matters, according to the new, unprecedented,¹⁰ unargued doctrine of the Court is the ability to make and give effect to a *decision* whether *or not* to beget or bear a child. Whichever way the individual's decision goes, the Constitution and the state, if they favor, recognize, and support one option, *must* obviously do the same for the other.

7. 410 U.S. 113, 152-53 (1973) (repeatedly claiming the same lineage).

8. 405 U.S. 438 (1972).

9. 405 U.S. at 453 (Brennan J. for the Court).

10. Unless, that is, we count *Stanley v. Georgia*, 394 U.S. 557 (1969), as is suggested with some plausibility in GERARD V. BRADLEY, *The Constitution and the Erotic Self*, FIRST THINGS 28, 30. But *Stanley* is not cited in the Court's judgment in *Casey*, though it wins one incidental mention in *Roe v. Wade*, 410 U.S. at 152.

A striking example of this assumption of neutrality between human goods and bads is the opening sentence of the oral argument of counsel for the ACLU in *Planned Parenthood v. Casey*: "Whether our Constitution endows Government with the power to force a woman to continue *or to end* a pregnancy against her will is the central question in the case."¹¹ And in due course the Court's judgment adopts and repeatedly appeals to the same implicit assumption of neutrality: *since* it is obvious that the state could not constitutionally force a woman to end a pregnancy against her will by obliging her to terminate the life within her, it must obviously and necessarily follow that the state cannot oblige her *not* to end that life. Symmetry. Since you must be permitted to choose life, you must be permitted to choose death. It is as if the Supreme Court in *Meyer v. Nebraska*, and *Pierce v. Society of Sisters* had said: since parents have a constitutionally protected right to provide non-State education for their children if they so choose, they must equally have the right to decide to give their children *no* education. The Court's argument in *Casey* would have been rejected as absurd at any time before the mid-sixties. The claim that there is a consistent sequence of precedents stretching back not 25, but 70 years, is untenable; it lacks the legal "integrity" that Ronald Dworkin (Professor of Jurisprudence in Oxford and Fellow of my College) made central to his general theory of law and legal rights.¹²

Before I reach Ronald Dworkin's treatment of *Cruzan* and the supposed legal right to death, I want to underline the radical character of the basic argument adopted by Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*. Five or six years ago, I had the opportunity to debate the meaning of autonomy with David A.J. Richards, Professor of Law at New York University and author of books such as *Sex, Drugs, Death and the Law* which argue that all laws for inhibiting one's chosen forms of sexual behavior, or one's choice to take drugs (non-addictive or addictive), or one's decision to kill oneself or to kill someone else at their request, are immoral and unconstitutional because all such laws violate our fundamental right to the dignity of autonomy, and flout the state's fundamental duty to be neutral with regard to the many disparate visions of the good life. At the time of our debate, I wondered whether there was

11. N.Y. TIMES, Apr. 23, 1992, at B10. The origins of the argument may be found in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1985) (Goldberg, J., concurring).

12. RONALD DWORKIN, *LAW'S EMPIRE* (1986). Cf. John Finnis, *On Reason and Authority in Law's Empire*, 6 *LAW AND PHILOSOPHY* 357-80 (1987).

really any point in contesting opinions as extreme as his—extreme even in the hothouse of law school philosophizing. But now the core of Richards' position is mainstream; it has been embraced by the Court in *Casey*:

“[m]atters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. . . . [b]eliefs . . . [which] define the attributes of personhood.” (*Casey*, 112 S. Ct. at 2807)

“These are intimate views with infinite variations, and their deep, personal character underlay our decisions . . .” (*Casey*, 112 S. Ct. at 2808)

“The fundamental right [of persons] . . . to determine the meaning of their own lives . . .”¹³

“a fundamental right to autonomy in deciding whom and how to love in order to preserve underlying values of personal emotional integrity and self-expression in intimate relations”¹⁴

In our debate I argued that Richards' claim to be advancing a conception of autonomy rooted in the sober philosophy of Immanuel Kant was grotesquely wrong.¹⁵ But the march of history proceeds without too much regard for demonstrations of this sort, and the Supreme Court has now adopted without care or qualification the central claims or premises of Richards' unrestrained apologia for an essentially unrestrained right to heroin, sodomy, and suicide.

II

Dworkin's article “*The Right to Death*,”¹⁶ takes a line most like Justice Stevens': “the life of the permanently vegetative . . . is not valuable to anyone.” “It is not in their interests to live on.” Indeed, continuing to live on is, for them, a net disadvantage; they are better off dead. “There is no way in which continued life can be good for such people.” Indeed, “it is at least a reasonable view that a permanently comatose person is, for all that matters, dead already”; the “bodies they used to inhabit” are only “technically alive.” And:

13. DAVID A. RICHARDS, *SEX, DRUGS, DEATH, AND THE LAW* 274 (1982).

14. DAVID A. RICHARDS, *RIGHTS & AUTONOMY*, 92 *ETHICS* 3, 16 (1981).

15. John M. Finnis, *Legal Enforcement of 'Duties to Oneself': Kant v. Neo-Kantians*, 87 *COLUM. L. REV.* 433, 439-52 (1987).

16. Ronald Dworkin, *The Right to Death*, *NEW YORK REVIEW OF BOOKS*, Jan. 4, 1991, at 14-17.

to care for them is to show "pointless and degrading solicitude."¹⁷

Now in the same article Dworkin repeatedly affirms the "intrinsic value of human life."¹⁸ But he gives the words a new sense: "once a human life has begun it is terribly important that it goes well." Thus, the words are meant to convey that there are human lives which are not going, or are likely not to go, "well enough" to be worth living. So: words hitherto taken as foundational to the exclusion of, say, abortion, are made to bear a meaning from which "it sometimes follows that abortion is morally recommended or required." This "intrinsic value of human life" grounds "the right to death,"¹⁹ wherever death would rescue one from something disadvantageous to one's "life considered as a whole."²⁰

III

Before plunging into that thicket of fundamental issues, I should outline my moral (and legal) position on the practical questions at stake in cases such as *Cruzan*. It is a position briefly, and not entirely adequately, expounded in that case by Justice Scalia, in a passage quite misunderstood by Dworkin.

The petitioners who wanted to end Nancy Cruzan's life argued that her death would be different from ordinary suicide on a number of grounds,²¹ one being that she (acting, as they claimed, through their agency) "would bring on her own death not by any affirmative act but by merely declining . . . nourishment."²² Justice Scalia points out that the distinction between action and inaction does not suffice for, though it has some bearing on, an answer to the question whether there is suicide. There is suicide whenever there is a conscious decision to put an end to one's own existence. Just as there can be murder by starvation, so there can be suicide by starvation or by sitting on the beach until submerged by the tide or by not shutting off the engine and getting out of the car after parking in one's garage. So the intelligent line, Scalia suggests, does not fall between "action and inaction," but between those forms of inaction that

17. *Id.* at 15-16.

18. *Id.* at 17.

19. *Id.*

20. *Cf. id.* at 16.

21. *Cruzan*, 497 U.S. at 261.

22. *Id.*

consist of abstaining from ordinary care and those that consist of abstaining from excessive measures.²³

Dworkin fails to understand that what matters is not the pattern of physical behavior, but the choice which shapes that behavior into a human action (in the narrow sense of "action") or deliberate omission (an action in the broad sense). The evidence of this failure of understanding is in Dworkin's statement that Scalia thinks, "that a conscious and competent patient who refuses an amputation that would prolong his life should be treated as a suicide . . ." ²⁴ As will by now be obvious, Justice Scalia does not say that, and is not committed to it; indeed he implicitly denies it. Along with the central moral tradition of our civilization, he accepts that it is not suicide to choose to refuse treatment precisely because it—having the treatment and undergoing its after-effects—is burdensome, and one chooses to reject the burden. One's death is not chosen, for it is neither one's end, nor a means to one's end, but a side-effect, foreseen and accepted (but not intended, not chosen), of one's choice to reject the burden. Such choices may in certain cases, perhaps many cases, be unjustified (cowardly, selfish), but need not be suicidal (homicidal).

Someone else, in the same situation, may make a suicidal choice—reviewing their prospects, they judge that they would rather die than live, would be better off dead, and choose death by means of refusing life-sustaining treatment.

Now apply these considerations to the *Cruzan* problem. Competent persons who envisage the future situation of being comatose, and who clearly and freely reject food in that situation (should it ever come about), may, but need not, be choosing to kill themselves. They may instead be choosing to be merciful to others by forgoing *all* expensive care, in order to free others of the burden of the cost of providing that expensive care for them, and accepting death as a side-effect (rather than choosing death as a means of relieving others of the costs, or themselves of a burdensome existence). And if people who have made and adequately communicated such a non-suicidal decision become comatose, others can comply with their choice without assisting in suicide, and without violating human solidarity with them by abandoning them. For, just in so far as that is a choice

23. *Id.* at 296-97.

24. Dworkin *op. cit.* n.16 at 17.

to comply with their wishes *as* morally proper, non-suicidal wishes, it is not a choice of abandonment but an affirmation of their dignity, and an act of solidarity with them.

Again, in any impoverished society (for example our own societies after a nuclear attack), other grave obligations could take priority over the duty to care for the comatose, lest other members of the community be deprived of necessities. But in an affluent society, to cease providing food and water to the permanently comatose who have never made or communicated a non-suicidal decision to forgo all care, that is, to abandon them, is to break off human communion with them and to deny their dignity as persons, their personhood. Those responsible for making such provision cannot—logically cannot—exercise mercy on others' behalf by accepting their death in order to avoid burdening the providers (or others in an affluent society).

I have just used the word "dignity," a word much used by Richards and Dworkin, and by the minority Justices in *Cruzan*.²⁵ Now it is indeed true that indignities which one may undergo, or undignified aspects of one's dependence in illness, disintegration, and dying, are real, and really related to one's intrinsic dignity. And it is true that a comatose person can be subjected to indignities, for example by being treated as a sex object, or by being dumped into the garbage, or by being systematically called "a vegetable." But the rhetoric of Dworkin and the Supreme Court's dignity/autonomy Justices systematically confuses the emotionally repugnant aspects of long-term coma (the mess of excrement and so forth), with lack of human dignity. These distinguished lawyers are offering to speak *for* the comatose, but in fact shroud them with dehumanizing epithets (preparatory, I think we should fear, to justifying the deliberate termination of their lives). Thus they say that for the comatose "the burden of maintaining the corporeal existence degrades the very humanity it was meant to serve"; their life is one of degradation; someone on life support has a "degraded existence."²⁶ All such remarks, however, confuse the emotional sense of "dignity," "dignified," "undignified," and "indignity" with the rational sense of "human dignity." For in the latter, essential sense, it is indeed true that one who helps the comatose, or other severely mentally disabled

25. See *Cruzan*, 497 U.S. at 311.

26. *Id.* (quoting *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 434, 497 N.E.2d 626, 635-36 (1986)).

people, is affirming and serving their dignity, and expressing solidarity with them as human persons, however gravely disabled.

Still, even discounting the judicial rhetoric, there remains a fair question: Is such care pointless? Does it at best affirm a value that is absent, and at worst impose on the object of care still further disvalue? Is the continued existence of the unconscious or other severely mentally disabled persons who can no longer do good things or have good experiences of any benefit to them? Does caring for them benefit either them or others? Does it maintain human solidarity with them, or is it just sentimental folly?

IV

Justice Stevens and Dworkin explicitly say, and Justice Brennan in *Cruzan* says implicitly, that one's life without cognitive-affective function, one's mere "biological" or "metabolic" existence, is of no value, constitutes no benefit, and is probably a burden.²⁷ The position that a life without cognitive-affective function is valueless is also held by revisionist theologians like Richard McCormick SJ, who bluntly says: "life in a P.V.S. is not a benefit or value to the patient," for there is no benefit without at least minimally conscious life, and anything else is merely an effect on "some part of the patient's anatomy," not on the patient.²⁸

But if that is so, the patient's anatomy and bodily life must be merely an instrument and an instrumental good, something that persons *have* and *use* for their specifically human or personal purposes, but which remains really distinct from what human persons *are*. And, in fact, Stevens and Dworkin draw that conclusion: One who has only this bodily life has ceased to be *as* a person, has no personal interests at stake, and "is for all that matters dead already."²⁹

But the great questions, whether life deprived of consciousness has any value, and whether one's living body is one's person, are questions to be decided by reason, not by feelings and rhetorically stirred imagination. When one considers living in a coma, one is

27. The position that it is a burden is articulated by Stevens when he approvingly quotes a dissenting state supreme court judge's statements that Nancy Cruzan, so far from being unconscious *as all the judgments including Stevens' and Brennan's assert*, "may react to pain stimuli" and may have some "awareness of her surroundings." *Id.* at 337; *compare Id.* at 2868 (Brennan), and 2886 (Stevens).

28. "Moral Considerations" *Ill Considered*, 166 *AMERICA* 210, 214 (1992).

29. Dworkin, *op. cit.* n.16 at 17. *Cruzan*, 497 U.S. at 345-47.

overwhelmed by the distance between this condition and the integral good of a flourishing human person. Nobody wants to be in that condition; no decent person wants anyone to be in it. The good of human life is very, very imperfectly instantiated in such an existence, so deprived and so unhealthy. But this does not show that human life considered in abstraction from all other human goods, such as play, friendship, and awareness of truth and beauty, is of no intrinsic goodness. No human good, considered *apart from* all the others, in a mode of existence (if it were possible) deprived of all the others, is appealing. But this does not show that basic human goods, such as those I have just mentioned, are instrumental, or other than intrinsically good. No more does the unappealing nature of comatose life show it to be valueless. For it is the very actuality of one's living body, and one's living body is one's person.

To deny that one's living body is one's person is to accept some sort of dualistic theory of human persons, according to which human beings are inherently disembodied realities who only *have* their bodies, only inhabit them and use them. This is clearly the basis on which Stevens proceeds in *Cruzan's* case: unconscious, therefore not a person, *therefore* not really living.³⁰ In the opening sentence of Scalia's judgment there is some careless rhetoric about science keeping "the human body alive for longer than any reasonable person would want to *inhabit* it";³¹ this is dualist talk, but in Scalia's judgment it remains just that, mere incautious talk.

No such dualism is rationally defensible. For every such dualism sets out to be a theory of one's personal identity as a unitary and subsisting self—a self always organically living but only discontinuously conscious, and now and then inquiring and judging, deliberating and choosing, and employing techniques and instruments to achieve purposes. But every such dualism renders inexplicable the unity in complexity that one experiences in every act one consciously does. We experience this complex unity more intimately and thoroughly than any other unity in the world; indeed, it is for us the very paradigm of substantial unity and identity. As I write this, I am the unitary subject of my fingers hitting the keys, the sensations I feel in them, the thinking I am articulating, my commitment to write this paper, my use of the computer to express myself. As I speak it, I am the unitary subject of the muscular effort in projecting my voice,

30. *Id.* at 349-51.

31. *Id.* at 292 (emphasis added).

of the hearing that voice, of observing your bodily responses, of the thoughts I am articulating and the thoughts I am not articulating (as I wonder how it's going across), and the emotions that colour all this. So the one reality that I am involves at once consciousness and bodily experience and behavior; and dualism sets out to explain *me*. But every dualism ends by denying that there is any *one* something of which to be the theory. It does not explain *me*; it tells me about two things, one a nonbodily person and the other a nonpersonal body, neither of which I can recognize as myself.³² So, one's living body is intrinsic to one's personal reality. One does not merely possess, inhabit or use one's body, as one possesses and uses an instrument or inhabits a dwelling. As St. Thomas Aquinas says: "My soul is not me [*anima mea non est ego*]," and "If only my soul is saved, then neither I nor any human person is saved."³³

But the real issue underlying *Cruzan* is more radical. For if the life of the permanently comatose is of no value, or is a disvalue, and care for them is pointless, what could possibly be wrong with killing them? Whether or not the standard case of withdrawing food and water from them is (as I think it is) a case of killing by omission, why not do what *indubitably* is deliberate killing, by commission—give them a lethal injection to end their life "without misery and fuss" (as is now done on a large scale in The Netherlands)?³⁴

The real issue³⁵ underlying *Cruzan* is, then: Is *killing* the permanently comatose, or those who can have no more good experiences, harming them? And we are now in a position to answer. Such persons can be harmed. They can be harmed by being subjected to indignities (thrown on the garbage, used as sex objects). And killing them is another way of harming them. To choose to kill such a

32. See Germain Grisez, *Should Nutrition and Hydration Be Provided to Permanently Comatose and Other Mentally Disabled Persons?* 5 ISSUES L. & MED. 165 (1989); JOHN FINNIS, ET AL., NUCLEAR DETERRENCE, MORALITY AND REALISM 304-09 (1987)

33. THOMAS AQUINAS, SUPER PRIMAM EPISTOLAM AD CORINTHIOS LECTURA, 15,3; see also his SUMMA THEOLOGIAE I q.75 a.4.

34. For evidence of the grim escalation of voluntary and non-voluntary "active" euthanasia by medical administration of toxic injections, since 1986, see John Keown, *Some Reflections on Euthanasia in The Netherlands* in LUKE GORMALLY (ed.), THE DEPENDENT ELDERLY: AUTONOMY, JUSTICE AND QUALITY OF CARE 70-100 (1992); Keown, *The Law and Practice of Euthanasia in The Netherlands*, 108 L.Q. REV. 51-78 (1992); CARLOS GOMEZ, REGULATING DEATH: EUTHANASIA AND THE CASE OF THE NETHERLANDS (1991).

35. Clearly foreseen and admirably answered in an analysis by William E. May, Germain Grisez and many others, Catholic, non-Catholic, and non-Christian. William E. May et al., *Feeding and Hydrating the Permanently Unconscious and Other Vulnerable Persons*, 3 ISSUES L. & MED. 203 (1987).

person is to choose to harm that person. And so it is inconsistent with a rational love of that person, and (however much motivated by feelings of affection and compassed about with thoughts and words of respect) is inconsistent with respect for, and justice to, the person. Whatever the feelings of solidarity that may accompany and suggest such a choice, it is a choice incompatible with a reasonable solidarity with the person so killed.

And such a choice is made whenever the person's dying is chosen, however reluctantly, as a means to an end, however good that end, and whether the chosen means to *that* means is a matter of commission or omission, of "active" steps or "passive" deliberate non-provision of the essentials of life.³⁶ All such choices, whatever their further motivations (often both very understandable and quite upright), are choices of death—to destroy life—precisely as such (as a means). They are not merely an acceptance of death as a side-effect of some other choice. They are choices *of* a bad (to destroy an instance of a basic human good), even when motivated by concern for some true good.

I have argued above that it is possible to withdraw artificial feeding and hydration without intending the death of the patient either as end or as means. But if we consider patients in an affluent society, patients whose death is not inevitably and truly imminent, then we should say that the standard case of such withdrawal—indeed *every* case where the purpose is something other than to give effect to the patient's genuine wishes—is a case where the death of the patient is the chosen means to liberating the patient or the carers or society at large from the burden of illness and care. Thus every such case is a case of intending to kill, and killing—that is, in the nicest possible way, of murdering.

VI

I promised to focus on three members of my College, but have mentioned only two. Still, the third scarcely needs to be named. As

36. In McCormick's *America* article, *supra* note 28, at 23, the truly central question of intention is immediately muddled into the different question of causation: Was the cause of death the omission of artificial hydration and nutrition or was it the underlying lethal pathology? Now, even in terms of physiological causation, McCormick's claim that the death in such cases is caused solely by the underlying disease or pathology is extremely implausible. These are not cases of discontinuing a *therapy*. But the much more important point to make against McCormick (whose view is not eccentric, but standard amongst dissenting, proportionalist professors of Catholic theology) is that the real issue is one of intent. A human act centrally is what it is intended to be.

we ask ourselves whether the five Justices who in *Casey* embraced the constitutional right to value-neutral, amoral autonomy, the right that will surely be used to impose the legalization of euthanasia³⁷ on all the states, unless one of the five is replaced by someone of a different mind, we are obliged to wonder who will have the right to nominate the next Supreme Court Justice. Will it be the present incumbent of the Presidency? Or perhaps instead the candidate who in the immediate aftermath of *Casey* promised to appoint only Justices sure to uphold the right to choose³⁸—the candidate I cannot but think of as a distinguished alumnus of my college.

37. Non-voluntary as well as voluntary, since the constitutional rights of children, the insane, and long-term unconscious must be exercised on their behalf "by agents acting with the best interests of their principals in mind." See *Cruzan*, 497 U.S. at 261.

38. See N. Y. TIMES, 1 July 1992, A15 col. 4; 2 July 1992 A14 col. 2; 4 July 1992 A10.

