

PRESERVING TRUE HUMAN DIGNITY IN HUMAN RIGHTS LAW

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I. INTRODUCTION

In 2014, the world met 29-year-old Brittany Maynard.¹ Maynard suffered from aggressive and terminal brain cancer.² Facing the prospect of physical and mental decline and the likelihood of intense pain, she decided to take her own life rather than suffer and die from the disease.³ “I’ve discussed with many experts how I would die from it and it’s a terrible, terrible way to die. So being able to choose to go with dignity is less terrifying.”⁴ Because her home state of California did not yet permit assisted suicide, Maynard moved to Oregon to take the medications that killed her.⁵

Articulate and engaging, Maynard posted a series of videos explaining her decision.⁶ She argued that she should be able to control the means and timing of her death by appealing to precious concepts—rightly precious—to us: individual rights and human dignity.⁷ Maynard insisted that she had a right to die with dignity.⁸ To her, that right meant that she should have autonomy over her death.⁹

It was hard not to sympathize with Maynard. On the surface, her argument sounded persuasive. Who could be against rights or human dignity?

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¹ Nicole Weisensee Egan, *Terminally Ill Woman Brittany Maynard Has Ended Her Own Life*, PEOPLE (May 9, 2017, 11:04 AM), <http://people.com/celebrity/terminally-ill-woman-brittany-maynard-has-ended-her-own-life/> [<https://perma.cc/J89G-C25A>].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See, e.g., Compassion & Choices, *A Video For All My Friends*, YOUTUBE (Oct. 29, 2014), <https://www.youtube.com/watch?v=1IHXH0Zb2QI> [<https://perma.cc/9S8R-73AR>].

⁷ *Id.* at 00:45.

⁸ *Id.* at 05:32.

⁹ *Id.* at 02:26.

Indeed, from the beginning of the human rights movement, human rights have inextricably been linked to human dignity. The United Nations Charter preamble affirms: “We the peoples of the United Nations determined . . . reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”¹⁰

The first great articulation of human rights after World War II came in the Universal Declaration of Human Rights (UDHR). It begins: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”¹¹ Rights and dignity are united. Indeed, the UDHR insists that human dignity is the basis of freedom and rights.¹² What follows the preamble are thirty articles fleshing out this synthesis of rights and dignity.¹³ And to make sure we do not miss this point, the UDHR’s first article reaffirms: “All human beings are born free and equal in dignity and rights.”¹⁴

In the years following the UDHR’s approval, the United Nations and regional bodies—such as the Council of Europe, the African Union, and the Organization of American States—created other declarations and treaties linking the protection of human rights to the promotion of human dignity.¹⁵

Given this essential tie between dignity and rights, it might seem that Maynard’s advocacy for the right to die with dignity would be uncontroversial. It has been anything but that. Maynard’s seemingly simple use of the term dignity—and that of other supporters of assisted suicide and euthanasia—veiled a genuine and crucial battle being waged over what dignity means.

¹⁰ U.N. Charter, Preamble.

¹¹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights preamble (Dec. 10, 1948).

¹² Mark L. Movsesian, *Of Human Dignities*, 91 NOTRE DAME L. REV. 1517, 1520 (2016) (“Louis Henkin famously referred to human dignity as the ‘ur-principle’ of contemporary human rights. Dignity is the ‘ultimate value,’ the universally agreed foundation for the entire regime.”).

¹³ See generally Universal Declaration of Human Rights, *supra* note 11.

¹⁴ *Id.* at art. 1.

¹⁵ See European Convention for the Protection of Human Rights and Fundamental Freedoms preamble, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights: “Pact of San José, Costa Rica” preamble, Nov. 22, 1969, 1144 U.N.T.S. 143 [hereinafter American Convention]; African (Banjul) Charter on Human and Peoples’ Rights preamble, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter].

To Maynard and the Death with Dignity movement, dignity is not something all humans have—or something they have in equal measure. It is something that may be gained, achieved, and preserved. As Ron Highfield explains this view, “[t]he more self-sufficient and self-defining we are, the more dignity we have.”¹⁶ Dignity can also be lost. This was Brittany Maynard’s great fear—that she would endure a death that, whether because of pain or the loss of independence or autonomy, lacked dignity.

The main competitor to Maynard’s view of dignity insists all humans have dignity by virtue of their humanity. Dignity is an innate attribute of being human. That dignity may not be lost or taken away, regardless of one’s physical or mental condition, degree of autonomy, or capacity to make choices.¹⁷

It matters a great deal which of these competing views is embraced. Indeed, which view prevails will, in some cases, determine whether something is a human right or a violation of human rights. This article argues that the Maynard version of dignity, while increasingly popular, poses grave dangers to both true dignity and rights. Instead, the fulfillment of the promise of the human rights movement depends on wholeheartedly reaffirming that human dignity, like human rights, is an essential attribute of every human.

Section II of this article digs deeper into the debate over the meaning of human dignity, discussing in more detail the competing views, including the leading contenders mentioned above. Section III then illustrates why this debate matters so much. It assesses the implications of how we view dignity for those with disabilities and those making end-of-life decisions for themselves or others.

II. DEBATE OVER THE MEANING OF HUMAN DIGNITY

A. *Competing Views of Human Dignity*

While used frequently, “dignity” is not simple to define. It is of Latin origin and generally means to be worthy of esteem or honor.¹⁸

This rough thumbnail definition masks deep divides, though, over issues like who has dignity and on what basis. There are several competing views

¹⁶ RON HIGHFIELD, *GOD, FREEDOM & HUMAN DIGNITY* 96 (2013).

¹⁷ *See id.* at 98.

¹⁸ Adam Schulman, *Chapter 1: Bioethics and the Question of Human Dignity*, in *HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS* 3, 6 (Mar. 2008).

of dignity. Those views have been grouped into three main categories: inflorescent, intrinsic, and attributive.¹⁹

The inflorescent view of dignity is rooted in Roman understandings of the term. “Cicero defined dignity as ‘the honorable authority of a person, which merits attention and honor and worthy respect.’”²⁰ Stoic philosophers believed that humans as a whole have dignity; dignity is what sets humans apart from animals.²¹ However, the Roman view was not that all humans have equal and inalienable dignity, as was encompassed in the intrinsic view; for example, slaves and women were viewed as having a lesser worth.²² Further, those who were said to display dignity were individuals of achievement who demonstrated virtues like courage or selflessness.²³

The intrinsic view of dignity maintains that dignity is an inherent and inalienable part of being human. Humans have worth because of their humanity, not because they display a particular set of skills or talents or are seen as worthy by others.²⁴ All have dignity. It is an essential quality of being human.

The attributive view of dignity “refers to the worth or value we attribute to individuals by virtue of the circumstances in which they find themselves, or who possess various characteristics or abilities, thus bestowing dignity on them.”²⁵ Under this view, one can have more or less dignity, or even lose dignity altogether, depending on certain factors. As described more fully below, the most common characteristics associated with having dignity—or a high degree of dignity—are things like having autonomy or manifesting

¹⁹ Daniel P. Sulmasy, *Chapter 18: Dignity and Bioethics: History, Theory, and Selected Applications*, in HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS 469, 470 (Mar. 2008); Ryan M. Antiel et al., *Dignity in End-of-Life Care: Results of a National Survey of U.S. Physicians*, U.S. NAT’L LIBR. OF MED., NAT’L INST. OF HEALTH (July 3, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3967404/> [<https://perma.cc/8KEU-2WPW>]; Mette Lebech, *What is Human Dignity?*, MAYNOOTH UNIV. 1, 2 (2004), http://mural.maynoothuniversity.ie/392/1/Human_Dignity.pdf [<https://perma.cc/59SP-X4YM>] (identifying four accounts of dignity based on the historical development of the term: Cosmo-centric, Christo-centric, Logo-centric, and Polis-centred).

²⁰ Sulmasy, *supra* note 19, at 471.

²¹ Lebech, *supra* note 19, at 3.

²² *Id.* at 4.

²³ Schulman, *supra* note 18; Sulmasy, *supra* note 19, at 471.

²⁴ Sulmasy, *supra* note 19, at 472.

²⁵ Antiel et al., *supra* note 19.

specific capacities: such as cognitive skills, communication abilities, or the competence to make plans or maintain one's independence.

While these views presuppose the existence of human dignity, it should be noted that some reject the notion of human dignity altogether. Oliver Wendell Holmes famously exclaimed: “[M]y bet is that we have not the kind of cosmic importance that the parsons and philosophers teach. I doubt if a shudder would go through the spheres if the whole ant heap were kerosened.”²⁶ Similarly: “I see no reason for attributing to a man a significance different in kind from that which belongs to a baboon or to a grain of sand.”²⁷

Dignity has faced more recent attacks as well. Ruth Macklin calls dignity a “useless concept,” urging that we embrace other value concepts like autonomy.²⁸ Stephen Pinker, in his article, “The Stupidity of Dignity,” also urged that dignity is not only a useless concept, but it is a dangerous one because it could lead us to reject certain biological technologies that might enhance or lengthen human life.²⁹

Despite their urgings to abandon dignity as a concept, exponents of this view have not gained much traction. Considerations of dignity continue to inform discussions of law and policy, and they play a central role in our view of human rights. The biggest divide today is between those advocating for the intrinsic and attributive views of dignity. The following sections, therefore, explore them in greater depth.

B. Intrinsic View

As noted above, the intrinsic view of dignity is that all people have dignity based on their humanity itself. This view enjoys strong support from Jewish and Christian theology. Both teach that God uniquely creates humans in his very image.³⁰ Rabbi David Wolpe calls this idea Judaism's greatest

²⁶ ALBERT W. ALSCHULER, *LAW WITHOUT VALUES* 23 (2000).

²⁷ *Id.*

²⁸ Steven Pinker, *The Stupidity of Dignity*, *NEW REPUBLIC* (May 28, 2008), <https://newrepublic.com/article/64674/the-stupidity-dignity> [<https://perma.cc/NK65-N76E>]; Mary Ann Glendon, *The Bearable Lightness of Dignity*, *FIRST THINGS* (May 2011), <https://www.firstthings.com/article/2011/05/the-bearable-lightness-of-dignity> [<https://perma.cc/UJ2P-8RT5>].

²⁹ Pinker, *supra* note 28.

³⁰ *Genesis* 1:26-27.

gift to the world.³¹ The Catholic Catechism's summary states well the consensus of various Christian traditions: "Being in the image of God the individual possesses the dignity of a person, who is not just something, but someone."³² Indeed, one can find statements of support for the intrinsic view in other leading world religions as well.³³

³¹ David Wolpe, *Strangers in the Land of the Free*, ATLANTIC (Jan. 31, 2017), <https://www.theatlantic.com/politics/archive/2017/01/iranian-jews-immigration/515241/> [<https://perma.cc/SS6K-82CB>].

³² POPE JOHN PAUL II, CATECHISM OF THE CATHOLIC CHURCH 91 (Libreria Editrice Vaticana 2nd ed. & trans., 2019) (1992). Mary Ann Glendon notes that even within the Christian tradition, dignity is used in slightly different ways. Glendon, *supra* note 28. While John Paul II insisted that even a murderer does not lose his dignity, Thomas Aquinas said that "a man who sins deviates from the rational order, and so loses his dignity To that extent, then, he lapses into the subjection of beasts." *Id.* She resolves the tension this way: "[T]he term 'dignity of the human person' has two different connotations in Christian teaching. In its ontological sense it is a given attribute of the person, while in its moral sense, it is a call toward an end to be gradually realized." *Id.*

³³ Susan C. Hascall, *Restorative Justice in Islam: Should Qisas Be Considered A Form of Restorative Justice?*, 4 BERK. J. MIDDLE E. & ISLAMIC L. 35, 75 (2011) ("In Islam, human dignity is derived from a person's status as G-d's creation and the representative of G-d on earth."); World Conference on Human Rights, *Cairo Declaration on Human Rights in Islam*, art. 1, U.N. Doc A/Conf.157/PC/62/Add.18 (Aug. 5, 1990) ("All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations. The true religion is the guarantee for enhancing such dignity along the path to human integrity."). There is some disagreement, however, on whether the Cairo Declaration fully supports the notion of innate and equal dignity of all humans. See Movsesian, *supra* note 12, at 1526 (noting that later sections of the Cairo Declaration seem to tie dignity to the practice of Islam. If so, "even if everyone is born with equal dignity, pious Muslims attain an enhanced dignity, superior to that of non-Muslims and, in fact, dissident Muslims." *Id.* at 1527). In Buddhism, some root the notion of dignity in the idea that all humans "are able to choose the path of self-perfection." *Buddhism and Human Dignity*, SOKA GAKKAI, <https://www.sokaglobal.org/resources/study-materials/buddhist-concepts/buddhism-and-human-dignity.html> [<https://perma.cc/V42G-92MR>] ("We can, in other words, consistently make those difficult choices for creativity, growth and development. This state of self-perfection—a condition of fully developed courage, wisdom and compassion—is described as Buddhahood or enlightenment. The idea that all people—all life, in fact—have this potential is expressed by the concept, stressed particularly in the Mahayana tradition, that all living beings possess Buddha nature.") (last visited July 16, 2021); see also Toru Shiotsu, (continued)

However, support for the intrinsic view of dignity does not require religious faith or the rooting of dignity in theological doctrine. Immanuel Kant famously argued for the dignity of all humans rooted in reason.³⁴ In his moral philosophy, he argued that all humans, based on our status as rational beings with moral freedom and responsibility, are worthy of respect and are bearers of dignity.³⁵ In his view, people are ends unto themselves; they can never be treated in a utilitarian or instrumental way as mere means to ends.³⁶

The intrinsic view of dignity is an objective one. Dignity is tied to something outside of a particular person or their personal choice. “Dignity derives, not from a person’s subjective choice, which may be disoriented or otherwise unworthy of respect, but from some ‘particular, preexisting norm or value’ that sets the boundary of dignity and ‘delimits’ the rights that follow from it.”³⁷

At its core, the intrinsic view is based on the idea that an individual’s dignity does not depend on them possessing certain attributes, skills, or capabilities. It does not depend on whether others view them as having worth. Their dignity comes from their humanness itself.

An excellent example of this view can be seen in the experience of civil rights heroine Rosa Parks. In her autobiography, *Rosa Parks: My Story*, Parks reflects on the event for which she is most remembered and revered: her refusal to give up her bus seat to a white man in Montgomery, Alabama in 1955.³⁸ She wrote: “People always say that I didn’t give up my seat because I was tired, but that isn’t true. I was not tired physically . . . No, the only tired I was, was tired of giving in.”³⁹ Likewise: “I was a person with dignity and self-respect, and I should not set my sights lower than anybody else just because I was black.”⁴⁰ Parks knew that despite society’s effort to attribute to her lower esteem and worth because she was black, she was a

Mahayana Buddhism and Human Rights: Focusing on Methods of Interpretation, 148 (2002), <http://www.iop.or.jp/Documents/0111/shiotsu.pdf> [<https://perma.cc/XD9U-ZQQU>].

³⁴ Schulman, *supra* note 18, at 10.

³⁵ *Id.*

³⁶ *Id.*; Sharon Bolton, *Dignity*, in *SOCIOLOGY OF WORK: AN ENCYCLOPEDIA* 162, 162 (Vicki Smith ed. 2013); *see also* Lebech, *supra* note 19, at 9 (warning that dignity may not be as secure under the Kantian view precisely because it is rooted in reason. “If reason fails . . . it is uncertain what happens to human dignity.” *Id.*).

³⁷ Movsesian, *supra* note 12, at 1522.

³⁸ *See* ROSA PARKS, *ROSA PARKS: MY STORY* 116-17 (1992).

³⁹ *Id.* at 116.

⁴⁰ *Id.* at 49.

person, a possessor of full dignity.⁴¹ One can—as she did—act in a dignified manner, just as one can act in an undignified manner. But it does not change the fact that she had an inherent dignity regardless of how others viewed her worth.

Crucially, the early human rights movement embraced the intrinsic view of dignity in its core institutions and instruments. The introduction noted the strong affirmation for the inherent dignity of all humans—and the crucial tie between that dignity and the existence of rights—in the United Nations Charter and the Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights.”⁴² The same view of human dignity is found in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the central treaties created under the auspices of the United Nations to flesh out, in a binding form, the aspirations of the UDHR.⁴³ The preamble to both the ICCPR and ICESCR states: “[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”⁴⁴

Regional human rights organizations embraced and affirmed the same view of dignity and rights. For example, the preamble to the American Convention on Human Rights begins: “Recognizing that the essential rights of all members of man are not derived from one’s being a national of a certain state, but are based on attributes of the human personality, and that they therefore justify international protection”⁴⁵ Article 5 of the African Charter on Human and People’s Rights proclaims: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.”⁴⁶

The intrinsic view of dignity has a firm rooting, therefore, not only in theological, philosophical, and historical sources but also in the core

⁴¹ One can—as Parks did—act in a dignified way (as one could act in an undignified way). But it does not change that she had an inherent dignity regardless of how others viewed her worth/value. See Movsesian, *supra* note 12, at 1522.

⁴² Universal Declaration of Human Rights, *supra* note 11, at art. 1.

⁴³ See International Covenant on Civil and Political Rights preamble, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights preamble, Dec. 16, 1966, 993 U.N.T.S. 3.

⁴⁴ International Covenant on Civil and Political Rights, *supra* note 43; International Covenant on Economic, Social, and Cultural Rights, *supra* note 43.

⁴⁵ American Convention, *supra* note 15.

⁴⁶ African Charter, *supra* note 15, at art. 5.

commitments of the human rights movement itself. This rooting is crucial as we look at the implications of different views of dignity for the protection of rights today.

C. *Attributive View*

Despite the intrinsic view's strong pedigree, it faces powerful attacks from the proponents of the attributive view of dignity. In the attributive view, individuals have dignity because they demonstrate specific attributes, skills, or capabilities.⁴⁷ Often, dignity under this view is tied to autonomy.⁴⁸ Individuals demonstrate their dignity through their ability to will and make choices.⁴⁹ Nietzsche, for example, insisted: "[D]ignity must be earned and can be acquired only by people who make themselves worthy by their own bold action."⁵⁰

The Death with Dignity movement grounds its assertion that individuals have a right to determine the timing and means of their deaths in this attributive view of dignity.⁵¹ Individuals should have the choice to end their lives while their dignity is intact before pain or disability erode that dignity. Crucial to this view, then, is the notion that dignity is not constant. Depending on the circumstances, individuals can have more or less dignity, and can even lose dignity altogether.

In contrast with the objective nature of the intrinsic view, the attributive view of dignity is subjective:

It begins with the understanding that human beings are autonomous agents who can legitimately construct their own identities One's identity is not set, but "changeable," a matter of individual volition. Dignity inheres in the choice itself, in the construction of one's identity as one thinks best, free from external constraints Dignity is not a matter of conforming oneself to objective moral reality, whether essential human nature, perduring communal traditions, or the true faith. It

⁴⁷ Sulmasy, *supra* note 19, at 473.

⁴⁸ Bernard Baertschi, *The Varieties of Human Dignity: A Logical and Conceptual Analysis*, 11 *BIOETHICAL INQUIRY* 201, 210 (2014).

⁴⁹ Sulmasy, *supra* note 19, at 473.

⁵⁰ HIGHFIELD, *supra* note 16, at 191.

⁵¹ *About Us*, DEATH WITH DIGNITY, <https://deathwithdignity.org/about/> [<https://perma.cc/XXW2-BVCG>] (last visited Oct. 4, 2022).

is acting in a way that realizes one's authentic self—"a subjective assent to one's true end."⁵²

The attributive view is widely accepted in public dialogue about end-of-life issues. After Brittany Maynard's death, columnist George Will, for example, wrote: "There is nobility in suffering bravely borne, but also in affirming at the end the distinctive human dignity of autonomous choice."⁵³ In similarly arguing for the right to assisted suicide, the *Economist* insisted, "[L]iberty and autonomy are sources of human dignity, too. Both add to the value of a life. In a secular society, it is odd to buttress the sanctity of life in the abstract by subjecting a lot of particular lives to unbearable pain, misery and suffering."⁵⁴

Many scholars support this attributive view of dignity. They agree that one's dignity and worth may depend on having and exercising autonomy or displaying specific capacities, such as having a certain level of cognitive function.⁵⁵ Bioethicist Dr. Joseph Fletcher, for example, contends that humans gain value only as they satisfy certain criteria, such as self-awareness, self-control, communication capability, and memory.⁵⁶ He insists: "Nobody in his right mind regards life as sacrosanct."⁵⁷

Influential Princeton professor Peter Singer agrees.⁵⁸ Singer is the Ira W. DeCamp Professor of Bioethics.⁵⁹ In 2013, the Gottlieb Duttweiler Institute named Singer the world's third most influential contemporary thinker.⁶⁰ Like Fletcher, Singer rejects the intrinsic view of dignity.⁶¹ "I do

⁵² Movsesian, *supra* note 12, at 1527-28.

⁵³ George F. Will, *Affirming a Right to Die with Dignity*, WASH. POST (Aug. 28, 2015), <https://www.washingtonpost.com/opinions/distinctions-in-end-of-life-decisions/2015/08/28/b34b8f6a-4ce7-11e5-902f-39e9219e574b> [<https://perma.cc/MK8D-LN38>].

⁵⁴ *The Right to Die*, ECONOMIST (June 27, 2015), <https://www.economist.com/leaders/2015/06/27/the-right-to-die> [<https://perma.cc/P4QQ-FRHZ>].

⁵⁵ Marion Hilligan et al., *Superhuman—Biotechnology's Emerging Impact on the Law*, 24 T.M. COOLEY L. REV. 1, 34 (2007).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 35.

⁵⁹ Peter Singer, U. CTR. FOR HUM. VALUES, <https://uchv.princeton.edu/people/peter-singer> [<https://perma.cc/A2PP-P3EH>] (last visited Oct. 4, 2022).

⁶⁰ Karin Frick et al., *The Top 100 Global Thought-Leaders*, GOTTLIEB DUTTWEILER INST., no. 4, 2013, at 8.

⁶¹ See Peter Singer, *Speciesism and Moral Status*, 40 METAPHIL. 567, 573 (2009).

not see any argument in the claim that merely being a member of the species *Homo sapiens* gives you moral worth and dignity, whereas being a member of the species *Pan troglodytes* (chimpanzees) does not give you worth and dignity.”⁶² There is nothing inherent in our humanity that confers a certain status:

We cannot claim that biological commonality entitles us to superior status over those who are not members of our species. In the case of applying this to people with severe and profound cognitive disabilities, there is also a problem about saying who the “we” are. What is really important about saying “us?”⁶³

Singer insists that he would have more in common with an alien with communication abilities “than I do with someone who was of my species but, because he or she is profoundly mentally retarded, has no capacity for verbal communication with me at all.”⁶⁴ He, therefore, calls for a graduated hierarchy of moral status—of dignity—that applies to members of any species, human or not.⁶⁵ Moral status depends on possessing attributes like cognitive ability, self-consciousness, self-awareness, and the ability to suffer or enjoy life.⁶⁶

The attributive view of dignity has influenced several key court decisions. These decisions have played a significant role in linking dignity with autonomy.

In 1992, the United States Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁶⁷ reaffirmed the central holding of *Roe v. Wade*⁶⁸ and found abortion to be a fundamental right under the Fourteenth Amendment of the Constitution. Core to the decision was the Court’s determination that essential to being human is exercising autonomy over critical areas of life such as marriage, procreation, and child-rearing.⁶⁹

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to

⁶² *Id.*

⁶³ *Id.* at 572-73.

⁶⁴ *Id.* at 573.

⁶⁵ *Id.* at 568.

⁶⁶ *Id.* at 575.

⁶⁷ 505 U.S. 833, 846 (1992).

⁶⁸ 410 U.S. 113, 114 (1973).

⁶⁹ *Casey*, 505 U.S. at 851.

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.⁷⁰

To the Court, that autonomy to make vital personal decisions is critical to having dignity.

The Supreme Court similarly linked autonomy with dignity when striking down state prohibitions on same-sex marriage in *Obergefell v. Hodges* in 2015.⁷¹ The Court concluded that fundamental liberties “extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal dignity and beliefs.”⁷² The Court emphasized: “There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.”⁷³

Justice Thomas challenged the majority's understanding of dignity in dissent, rejecting the notion that allowing same-sex marriage would advance the dignity of same-sex couples.⁷⁴ He articulated the intrinsic view of dignity in response:

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that “all men are created equal” and “endowed by their Creator with certain unalienable Rights,” they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth.⁷⁵

⁷⁰ *Id.* For an interesting comparison between *Casey* and the analysis of dignity by the German Federal Constitutional Court (GFCC), see Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 210 (“By contrast, in Germany, the GFCC held in 1975 that the Basic Law demanded respect and protection for the human dignity of the fetus and concluded that abortion must be criminalized.”).

⁷¹ *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015).

⁷² *Id.* at 645.

⁷³ *Id.* at 666.

⁷⁴ *Id.* at 735 (Thomas, J., dissenting).

⁷⁵ *Id.* Justice Thomas was heavily criticized for this position. See, e.g., Jamil Smith, *Clarence Thomas's Disgraceful Definition of Human Dignity*, NEW REPUBLIC (June 26, 2015), <https://www.newrepublic.com/article/144444-clarence-thomas-dignity> (continued)

The Canada Supreme Court similarly employed the attributive view of dignity in *Carter v Canada* in 2015, when it concluded that prohibiting medical assistance in dying violated section 7 of the Charter of Rights and Freedoms.⁷⁶ Specifically, it found the prohibition violated the rights to liberty and personal security because it denied individuals the autonomy to make personal choices about their medical care and bodily integrity.⁷⁷ The Court strongly linked autonomy with dignity. It noted: “Underlying both of these rights [liberty and personal security] is a concern for the protection of individual autonomy and dignity.”⁷⁸ It further explained this tie between autonomy and dignity:

An individual’s response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment, but denies them the right to request a physician’s assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by leaving people like Ms. Taylor to endure intolerable suffering, it impinges on their security of the person.⁷⁹

Later in the opinion, the *Carter* Court made clear its rejection of the intrinsic view of dignity by insisting that dignity can be diminished.⁸⁰ While the Court affirmed that every human person has dignity, it found that “[t]o deprive a person of constitutional rights arbitrarily or in a way that is overbroad or grossly disproportionate diminishes that worth and dignity.”⁸¹

In 2019, the Quebec Superior Court took the *Carter* holding a step further.⁸² After *Carter*, Canada enacted a Medical Assistance in Dying

2015), <https://newrepublic.com/article/122178/clarence-thomas-marriage-equality-dissent-all-abouthim> [<https://perma.cc/CA89-2S6V>].

⁷⁶ *Carter v. Canada*, [2015] S.C.R. 331, para. 81 (Can.).

⁷⁷ *Id.* at para 65-66.

⁷⁸ *Id.* at para 64.

⁷⁹ *Id.* at para. 66.

⁸⁰ *Id.* at para. 81.

⁸¹ *Id.*

⁸² See *Medical Assistance in Dying*, GOV’T OF CAN., <https://www.canada.ca/en/health-canada/services/medical-assistance-dying.html> [<https://perma.cc/FY44-R5XR>] (July 26, (continued)

(MAiD) law, which allowed individuals to seek medical help in bringing about their deaths where they had a grievous and irremediable medical condition and where natural death was reasonably foreseeable.⁸³ In *Truchon v Canada*,⁸⁴ the Quebec court struck down the reasonably foreseeable natural death requirement, finding that it violated the plaintiff's fundamental rights under Charter articles 7 and 15.⁸⁵

The Court concluded that forbidding nonterminal patients experiencing physical and psychological suffering from accessing medical assistance in dying wrongly infringed their choice and dignity: "Mr. Truchon and Ms. Gladu are prevented from making this fundamental decision and from exercising this highly private decision-making autonomy that reflects their value and dignity as human beings."⁸⁶ Similarly:

Therefore, the state, by enacting the reasonably foreseeable natural death requirement, directly interferes with their physical integrity, causes them physical and psychological pain and deprives them of the opportunity to make a fundamental decision that respects their personal dignity and integrity.⁸⁷

The court made it crystal clear that it rejected the intrinsic view of dignity. While all have a right to dignity, dignity can be diminished or even lost altogether:

The principle stated by the Supreme Court is not to require that people continue to live against their will until, after a given period, they naturally reach the stage of imminent death where they can request medical assistance in dying, after having suffered pointlessly and at the cost of the total denial of their dignity.⁸⁸

2022); *News Release: New Medical Assistance in Dying Legislation Becomes Law*, DEP'T OF JUST. CAN. (Mar. 17, 2021), <https://www.canada.ca/en/department-justice/news/2021/03/new-medical-assistance-in-dying-legislation-becomes-law.html> [<https://perma.cc/GZ88-N9BK>].

⁸³ *Medical Assistance in Dying*, *supra* note 82; *New Medical Assistance in Dying Legislation Becomes Law*, *supra* note 82.

⁸⁴ [2019] Q.C.C.S. 3792 (Can.).

⁸⁵ *Id.* at para. 12.

⁸⁶ *Id.* at para. 533.

⁸⁷ *Id.* at para. 534.

⁸⁸ *Id.* at para. 584.

Dignity does not belong to all people. It belongs to those with specific attributes and capabilities—particularly the autonomy to make end-of-life decisions.

This view of dignity reflects a marked shift from the intrinsic view articulated in the foundational human rights documents like the UDHR and ICCPR. In them, all humans are born equal with dignity and rights. To be human is to possess dignity. To the *Truchon* court, while all individuals have a right to dignity, they do not necessarily possess dignity itself. Dignity may be diminished or lost altogether.

Professor George Smith would support the *Truchon* court's significant linguistic shift from individuals possessing dignity to possessing only a right to dignity.⁸⁹ Indeed, Smith uses this linguistic shift to reinterpret the Universal Declaration of Human Rights itself to fit the attributive dignity narrative.⁹⁰ In his revisionist approach, Smith claims that the UDHR's language affirming the inherent dignity of all also provides for a right to dignity: "The Declaration states further that not only are '[a]ll human beings . . . born free and equal in dignity and rights' but each is entitled to have both respect and value, and to a right to dignity."⁹¹

Smith's move, which lacks any support in the UDHR's text itself, has a powerful effect. His newly created "right to" dignity requires the right to end one's life. "Included within the right to human dignity must be 'a right to live with dignity, and thus a right to end one's life in indignity—indeed, a right not to be compelled to live the remainder of life in indignity.'"⁹²

Whether we affirm an intrinsic or attributive view of dignity has profound implications for the way we view and protect human rights. The remainder of the article will explore those implications for those with disabilities and those making end-of-life decisions for themselves or others.

III. IMPLICATIONS FOR HUMAN RIGHTS

A. *Dignity and Disability*

1. *Threat to the Rights of Disabled Individuals*

Whether the intrinsic or attributive view of dignity is embraced matters tremendously to individuals with disabilities. Disabilities can impact our

⁸⁹ See George P. Smith II, "Dignity in Living and in Dying": *The Henry H. H. Remak Memorial Lecture*, 25 IND. J. GLOB. LEGAL STUD. 414, 425 (2018).

⁹⁰ *Id.* at 430.

⁹¹ *Id.* at 419.

⁹² George P. Smith II, *Human Dignity as a Normative Standard or as a Value in Global Health Care Decisionmaking?*, 42 N.C. J. INT'L L. 275, 280 (2017).

physical and mental capabilities or our capacity to exercise autonomy and make choices. If dignity is not inherent but depends on those capabilities or capacities, then human rights based on that dignity are at risk.

The United Nations estimates that fifteen percent of the world's population—or approximately one billion people—lives with disabilities.⁹³ Disabled individuals are the world's largest minority group.⁹⁴ Those suffering from disabilities often face higher rates of poverty and abuse.⁹⁵

Given their unique vulnerabilities, disabled individuals need strong protection from human rights instruments and institutions. Sadly, though, there are those today advocating that people with certain disabilities have lesser worth, and should have fewer rights than others. This is the clear implication from the writings of ethicist Peter Singer described above. Recall that Singer advocates for one's moral status to be determined based on a sliding scale of attributes like cognitive ability, self-consciousness, self-awareness, and the ability to suffer or enjoy life.⁹⁶ This view has frightening implications for those with profound disabilities. Singer opines:

I accept the normative view that there is greater significance in killing a being who has plans for the future—who wishes to accomplish things—than there is in killing a being who is incapable of thinking about the future at all but exists either moment to moment or within a very short-time horizon (for example, a time horizon limited to thinking about eating something in the near future).⁹⁷

Armed with this view, Singer accepts infanticide for infants with severe mental retardation or Down syndrome.⁹⁸ Similarly, he supports the involuntary euthanasia of adults with advanced Alzheimer's or who otherwise lack cognitive ability.⁹⁹

Using a similar analysis, Ethicists Alberto Giubilini and Francesca Minerva, too, approve ethically of what they call “after-birth abortion”—really infanticide—for a newborn child under any circumstances where

⁹³ *Factsheet on Persons with Disabilities*, U.N. DEP'T OF ECON. AND SOC. AFFS., <https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html> [<https://perma.cc/P97V-YJVL>] (last visited Oct. 4, 2022).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Singer, *supra* note 61, at 575.

⁹⁷ *Id.* at 576.

⁹⁸ *Id.* at 579-80.

⁹⁹ Hilligan et al., *supra* note 55, at 35.

abortion would have been permitted.¹⁰⁰ These circumstances include the child being born with severe abnormalities or even where raising a healthy child risks the “well-being of the family.”¹⁰¹ They reach this position by denying the existence of intrinsic human dignity. While a newborn child is human, he or she is not yet a “person.”¹⁰² A person—with a moral status conferring a right to life—is “an individual who is capable of attributing to her own existence some[,] at least[,] basic value such that being deprived of this existence represents a loss to her.”¹⁰³ While they do not use the term, Giubilini and Minerva base one’s dignity—moral status—on factors like the level of mental development, the capability of experiencing pain and pleasure, and the capability of making and fulfilling aims for the future.¹⁰⁴

Their reliance on the attributive view of dignity has stark ethical implications for all infants, but certainly those with disabilities. Giubilini and Minerva conclude, for instance, that we may ethically kill newborn children with Down syndrome and others with severe disabilities because they cannot yet form an aim for the future, and their upbringing might be “an unbearable burden on the family and on society as a whole.”¹⁰⁵

2. *Disability and Eugenics*

We have acted on inclinations like those of Giubilini and Minerva before. The eugenics movement of the nineteenth and twentieth centuries, too, was based on the view that certain people—and people with certain attributes—were of greater worth than others.¹⁰⁶ One of its most important efforts was to use selective breeding to improve the human species.¹⁰⁷ Francis Galton, Charles Darwin’s half-cousin, first used the term “eugenics” in 1881.¹⁰⁸ To Galton, eugenics was an opportunity to speed up the evolutionary improvement of humanity: “What nature does blindly, slowly,

¹⁰⁰ Alberto Giubilini & Francesca Minerva, *After-Birth Abortion: Why Should the Baby Live?*, 39 J. MED. ETHICS 261, 261-62 (2013).

¹⁰¹ *Id.* at 262.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 261. This is the case even though Giubilini and Minerva accurately note that “people with Down syndrome, as well as people affected by many other severe disabilities, are often reported to be happy.” *Id.*

¹⁰⁶ Mark Mostert, *Useless Eaters: Disability as Genocidal Marker in Nazi Germany*, 36 J. SPECIAL EDUC. 155, 156 (2002).

¹⁰⁷ *Id.* at 158.

¹⁰⁸ *Id.*

and ruthlessly, man may do providently, quickly, and kindly.”¹⁰⁹ Like many others, Margaret Sanger, founder of Planned Parenthood agreed. She bluntly advocated: “More children from the fit, less from the unfit.”¹¹⁰

Many governments embraced eugenics. Approximately 60,000 Americans were involuntarily sterilized after being deemed unfit in judicial proceedings.¹¹¹ The United States Supreme Court gave its full approval to the practice. In the 1927 case of *Buck v. Bell*, the Court upheld the involuntary sterilization of a 21-year-old woman, with Justice Oliver Wendell Holmes infamously declaring: “Three generations of imbeciles are enough.”¹¹²

Eugenics was a global phenomenon. Governments involuntarily sterilized hundreds of thousands of women worldwide.¹¹³ Eugenics perfectly fit the Nazi program in the 1930s and 1940s. In 1933, the Nazis enacted a sterilization law entitled, “Law for the Prevention of Genetically Diseased Offspring.”¹¹⁴ But this was only the beginning of their eugenic efforts. In 1939, the Nazis targeted disabled individuals more directly. Concluding that some lives were “unworthy of life,” the Nazis began widespread extermination of people with disabilities.¹¹⁵ They killed as many as 250,000 disabled individuals by the end of World War II¹¹⁶; they called them “empty human husks” and “useless eaters.”¹¹⁷ Of course, the Holocaust itself was a further application of this eugenic principle as the Nazis killed millions of

¹⁰⁹ Ron Arnold, *Eugenic Abortion 2.0*, AM. SPECTATOR (May 23, 2013, 12:00 AM), https://spectator.org/55745_eugenic-abortion-20/ [<https://perma.cc/26UZ-73F6>].

¹¹⁰ *Id.* For more on early leaders in the eugenics movement, see Jacqueline Laing, *Information Technology and Biometric Databases: Eugenics and Other Threats to Disability Rights*, 3 J. LEGAL TECH. RISK MGMT. 9, 10-17 (2008) [<https://perma.cc/XFJ5-QGRK>].

¹¹¹ Hilligan et al., *supra* note 55, at 45.

¹¹² 274 U.S. 200, 207 (1927).

¹¹³ David Gems, *Politically Correct Eugenics*, 20 THEORETICAL MED. & BIOETHICS 201, 202 (1999).

¹¹⁴ Mostert, *supra* note 106, at 159.

¹¹⁵ *Id.* at 161.

¹¹⁶ Maurice R. Berube, *Berube: A Spiritual Pilgrimage*, VIRGINIAN-PILOT (Apr. 12, 2015, 12:00 AM), https://www.pilotonline.com/opinion/columns/article_b21873d7-72ce-5396-bd44-6fd37f6b5650.html [<https://perma.cc/7M2N-H4WD>].

¹¹⁷ Mostert, *supra* note 106, at 157.

Jews, gays, lesbians, and Roma, all of whom were also deemed unfit and useless.¹¹⁸

3. *Human Rights Protections for Those with Disabilities*

Protection of the fundamental human rights of disabled individuals—based on the intrinsic worth and dignity of all people—is a direct rejection of our eugenic past. Harvard Law professor Mary Ann Glendon writes of the powerful impact created by the liberation of Nazi concentration camps. “When the full horrors implicit in the idea of ‘life unworthy to live’ (*Lebensunwertesleben*) came to light, the concept of the dignity of human life began to receive serious attention from opinion shapers.”¹¹⁹ It was no accident that the United Nations Charter and Universal Declaration of Human Rights put dignity front and center in their articulation of the basis of human rights. Leaders worldwide had seen firsthand the implications of embracing a view that only some individuals have dignity—or that some individuals have more dignity than others. The intrinsic view of dignity shaped these first documents and the human rights conventions and declarations that followed.

The conviction that all humans are born with equal dignity also spurred specific international legal protections for people with disabilities. The United Nations General Assembly approved two disability-related declarations in the 1970s: the Declaration on the Rights of Mentally Retarded Persons in 1971, and the Declaration on the Rights of Disabled

¹¹⁸ Berube, *supra* note 116. The eugenic impulse lives on today. See Peter Schworm, *Court Strikes Decision for Mentally Ill Woman’s Abortion*, BOS. GLOBE (Jan. 17, 2012, 3:08 PM), <https://www.bostonglobe.com/metro/2012/01/17/appeals-court-rules-that-state-cannot-order-mentally-ill-woman-have-abortion/FnbayuYlwyzjNgowPOfL7N/story.html> [<https://perma.cc/95LX-WEFH>]. In 2012, a Massachusetts probate court judge ordered that a 32-year-old pregnant woman be forced to have an abortion even if she had to be “coaxed, bribed or even enticed” into the hospital. *Id.* This decision was overturned on appeal. *Id.* Individuals sometimes express eugenic sentiments when defending abortion rights. See Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES MAG. (July 7, 2009), <https://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html> [<https://perma.cc/4VU2-TA2V>]. In 2009, United States Supreme Court Justice Ruth Bader Ginsburg stated the following in a New York Times interview: “Frankly I had thought that at the time Roe was decided, there was concern about population growth and particularly growth in populations that we do not want to have too many of.” *Id.* In 2012, Nancy Snyderman, NBC’s chief medical editor, “nonchalantly called the embrace of eugenic abortion ‘pro-science’ and thought it a ‘great way to prevent diseases.’” Arnold, *supra* note 109.

¹¹⁹ Glendon, *supra* note 28.

Persons in 1975.¹²⁰ The United Nations continued to advocate for disability rights in the 1980s and 1990s. Indeed, it proclaimed 1983 to 1992 the United Nations Decade of Disabled Persons.¹²¹

In the last two decades though, the strongest international steps to affirm and protect the rights of disabled persons have been taken. From 2002–2006, national representatives negotiated what became known as the Convention on the Rights of Persons with Disabilities (Disabilities Convention).¹²² This treaty, binding for ratifying nations, came into force in 2008.¹²³

Affirming human dignity is central to the Disabilities Convention. The term “dignity” appears more in the Disabilities Convention than in any other universal treaty.¹²⁴ And the Convention embraces the intrinsic view of dignity. The Convention’s preamble begins: “Recalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world”¹²⁵ Article one continues the theme: “The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”¹²⁶

In 2014, the United Nations Human Rights Committee created a special rapporteur position on the Rights of Persons with Disabilities, naming Catalina Devandas-Aguilar as the first person to assume the role.¹²⁷ She served until 2020 and, like the Disabilities Convention itself, was a strong

¹²⁰ Catalina Devandas-Aguilar (Special Rapporteur on the Rights of Persons with Disabilities), *Rep. on the Rts. of Persons with Disabilities*, ¶ 5, U.N. Doc. A/HRC/28/58 (Feb. 2, 2015).

¹²¹ *Id.*

¹²² *Id.* ¶ 8.

¹²³ *Id.*

¹²⁴ Catalina Devandas-Aguilar (Special Rapporteur on the Rights of Persons with Disabilities), *Rts. of Persons with Disabilities*, ¶ 41, U.N. Doc. A/HRC/43/41 (Dec. 17, 2019) [hereinafter *Rts. of Persons with Disabilities (2019)*].

¹²⁵ Convention on the Rights of Persons with Disabilities preamble, Dec. 13, 2006, 2515 U.N.T.S. 3.

¹²⁶ *Id.* at art. 1.

¹²⁷ Catalina Devandas Aguilar, *Former Special Rapporteur on the Rights of Persons with Disabilities*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/CatalinaDevandas.aspx> [<https://perma.cc/ZW6U-8FHG>] (last visited Oct. 4, 2022).

advocate for the intrinsic view of human dignity.¹²⁸ In a 2019 comprehensive report on her work to the Human Rights Committee, Devandas-Aguilar shared:

Life with a disability is a life worth living equal to others. Every person has a unique set of unrepeatable characteristics and experiences that make them irreplaceable and valuable. The lives of persons with disabilities are human lives and, consequently, endowed with inherent dignity. Persons with disabilities can live fulfilling lives and enjoy what gives life meaning. They share the same aspirations as everyone else, such as making friends, getting a job, living on their own, starting a family or accomplishing their dreams. Persons with disabilities bring talent, diversity and richness to their communities. While they may face more barriers in achieving their aspirations, their endeavours and accomplishments contribute to building more inclusive and diverse societies for the benefit of all.¹²⁹

4. *Current Challenges to the Protection of Rights of the Disabled*

Despite the legal protections described above, persons with disabilities still face significant challenges. In many nations, disabled individuals are denied equal rights with non-disabled persons. For example, in Iran, they “face stigma and discrimination from government social workers, health-care workers, and others.”¹³⁰ Access to education is a particularly grave challenge. In nations like Iran and Zimbabwe, disabled children are often excluded from the public school system.¹³¹

Sadly, eugenic practices continue in many parts of the world as well. In 2017, Special Rapporteur Devandas-Aguilar described forced sterilization as a “widespread human rights violation across the globe.”¹³² Especially

¹²⁸ *See id.*

¹²⁹ *Rts. of Persons with Disabilities (2019)*, *supra* note 124, ¶ 74.

¹³⁰ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Iran 2020 Human Rights Report 59 (2020).

¹³¹ *Id.*; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Zimbabwe 2020 Human Rights Report 43 (2020).

¹³² Catalina Devandas-Aguilar (Special Rapporteur on the Rights of Persons with Disabilities), *Rep. on Sexual and Reproductive Health and Rights of Girls and Young Women with Disabilities*, ¶ 29, U.N. Doc. A/72/133 (July 14, 2017).

vulnerable are women and girls with intellectual and “psychosocial disabilities” and those who are institutionalized.¹³³ Others endure forced contraception and abortion.¹³⁴

China is one nation that employs eugenic practices against disabled individuals today. In its 2020 China Country Report on Human Rights Practices, the United States State Department revealed, “The law forbids the marriage of persons with certain mental disabilities, such as schizophrenia. If doctors find a couple is at risk of transmitting congenital disabilities to their children, the couple may marry only if they agree to use birth control or undergo sterilization.”¹³⁵ The State Department also reported that government officials sometimes require pregnant women to undergo abortions when prenatal examinations reveal that the fetus may have a disability.¹³⁶ “The law stipulates local governments are to employ such practices to eliminate the births of children with disabilities.”¹³⁷

In 2019, Devandas-Aguilar described other coercive practices often faced by those with disabilities.¹³⁸ She noted that persons with cognitive or psychosocial disabilities, dementia, and autism are frequently viewed as incompetent to consent or object to treatment.¹³⁹ Some are forced to undergo medical interventions and even research and experimentation without their consent.¹⁴⁰

People with disabilities, particularly girls and young women, also face a higher risk of violence, abuse, and exploitation.¹⁴¹ In Somalia, for example, disabled women and girls frequently are raped and face other forms of gender-based violence, “often with impunity, due to perceptions that their disabilities were a burden to the family or that such persons were of less value and could be abused.”¹⁴² Disabled children are four times more likely to experience violence than children without disabilities; deaf, blind, or

¹³³ *Id.*

¹³⁴ *Id.* ¶ 31.

¹³⁵ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., China 2020 Human Rights Report 71 (2020).

¹³⁶ *Id.* at 71-72.

¹³⁷ *Id.* at 72.

¹³⁸ *Rts. of Persons with Disabilities (2019)*, *supra* note 124, ¶ 29.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Rep. on Sexual and Reproductive Health and Rights of Girls and Young Women with Disabilities*, *supra* note 132, ¶ 35.

¹⁴² U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Somalia 2020 Human Rights Report 40-41 (2020).

autistic children are particularly vulnerable.¹⁴³ The abuse is compounded by the reality, again, that people with disabilities are frequently viewed as incompetent. Not only may they not consent or object to treatment, but they are not considered competent witnesses. The impact is that, too often, as noted in the Somalia example, those who inflict violence on disabled individuals are not brought to justice.¹⁴⁴

5. *The Necessity of Embracing an Intrinsic View of Human Dignity*

How dignity is viewed makes a critical difference in the treatment of individuals with disabilities. Only the intrinsic view of dignity offers lasting protection for their rights. Under the intrinsic view, all persons—disabled or not—possess inherent and equal dignity. All human lives have worth. All persons deserve to be protected and to have their worth affirmed. Disability, while it may pose profound challenges, does not diminish the value of a life. It does not make life not worth living. Dignity does not rise or fall with one’s physical or mental condition.

By contrast, the attributive view poses grave dangers. Under this view, worth and dignity are based on possessing specific attributes and skills, that some disabled persons may not have. Inevitably, some disabled people will not meet the “worthy” cognitive or physical standard. Some, as they age, experience accidents, or face disease, will see their attributes and skills decline. Their lives will be viewed as having lesser worth and dignity.

Forced sterilizations, compelled abortions, discrimination, and increased levels of violence concretely demonstrate the danger of devaluing disabled individuals. The Death with Dignity movement furthers their devaluation. The movement is predicated on the idea that at some level of pain or disability, suffering individuals no longer have an appropriate level of dignity—or perhaps dignity at all. The next step is that such lives—disabled and undignified—are unworthy of life.

We must forcefully reject this dangerous conclusion. All lives, including those of disabled individuals have value—and dignity. New York Court of Appeals justice Eugene Fahey, concurring in *Myers v. Schneiderman*, put it well:

A disability does not deprive life of integrity or value. There is no lack of nobility or true dignity in being dependent on others. The natural developments of old age and final illness

¹⁴³ *Rep. on Sexual and Reproductive Health and Rights of Girls and Young Women with Disabilities*, *supra* note 132, ¶ 35.

¹⁴⁴ Somalia 2020 Human Rights Report, *supra* note 142.

are dependence and waning consciousness. Many disabilities come with similar challenges. It would be a profound mistake to equate limits imposed on a person's life with the conclusion that such a life has no value.¹⁴⁵

B. Dignity and End-of-Life Decisions

As with the protection of disabled individuals, the way dignity is viewed has potent implications for approaching the issues of assisted suicide and euthanasia. The Death with Dignity movement in the United States and the push for the legalization of assisted suicide and euthanasia in other nations has been driven by the attributive view of dignity and a rejection of the intrinsic view. And this has weakened protections for vulnerable individuals.

1. Status of Assisted Suicide and Euthanasia

This article began with the story of Brittany Maynard and her stated desire to “choose to go with dignity.”¹⁴⁶ Two very significant developments on end-of-life decisions took place in North America in 2015, the year following Maynard's death. In *Carter v. Canada*, the Canada Supreme Court struck down bans on physician-assisted suicide as infringing the rights to life, liberty, and security of the person protected by the Charter of Fundamental Freedoms.¹⁴⁷ The decision has been described as a “game-changer for the movement to afford Canadians the right to die with dignity.”¹⁴⁸ The Canadian Parliament responded by enacting Canada's MAiD law.¹⁴⁹ The law permitted individuals who were at least 18 years of age and mentally competent to seek medical assistance in ending their life if they suffered from a “grievous and irremediable medical condition” and “natural death has become reasonably foreseeable.”¹⁵⁰

The second significant development in 2015 was that California enacted a law permitting physician-assisted suicide.¹⁵¹ It modeled its law on

¹⁴⁵ *Myers v. Schneiderman*, 85 N.E.3d 57, 84 (N.Y. 2017) (Fahey, J., concurring).

¹⁴⁶ Egan, *supra* note 1.

¹⁴⁷ *Carter v. Canada*, [2015] S.C.R. 331, para. 70 (Can.).

¹⁴⁸ *Carter v. Canada and the Road to Choice*, DYING WITH DIGNITY CAN., https://www.dyingwithdignity.ca/carter_v_canada_and_the_road_to_choice [<https://perma.cc/8RXB-7VPZ>] (last visited Oct. 4, 2022).

¹⁴⁹ See *Medical Assistance in Dying*, *supra* note 82.

¹⁵⁰ *Id.*

¹⁵¹ Brakkton Booker, *California Governor Signs Physician-Assisted-Suicide Bill into Law*, NPR: THE TWO WAY (Oct. 5, 2015, 6:49 PM), <https://www.npr.org/sections/thetwo->
(continued)

Oregon's Death with Dignity Law passed in 1994.¹⁵² The law permits competent adults who are terminally ill—meaning death is expected to occur within six months—to request medical assistance in ending their lives.¹⁵³

In the following years, the law regarding end-of-life options has continued to develop. In the United States, more states followed California's example. Today, nine states plus the District of Columbia have Death with Dignity laws.¹⁵⁴ These laws follow the same general framework as Oregon's and California's. Any capable adult may request physician-assisted suicide when they suffer from a terminal illness likely to cause death within six months.¹⁵⁵

In Canada, the 2019 decision of the Quebec Superior Court in *Truchon v. Canada* led to significant changes in Canada's MAiD law.¹⁵⁶ As described above, the court found that the "reasonably foreseeable natural death" requirement of the post-*Carter* MAiD law violated individuals' fundamental rights under the Charter of Rights and Freedoms.¹⁵⁷ In response to *Truchon*, Parliament made the following changes to MAiD. First, a reasonably foreseeable natural death is no longer a requirement for MAiD eligibility.¹⁵⁸ Second, starting on March 17, 2023, mental illness will satisfy the "grievous and irremediable medical condition" requirement for MAiD.¹⁵⁹ Third, certain requirements related to making a MAiD request have changed. Now, a requesting individual only needs one independent witness, instead of two, to sign the request.¹⁶⁰ Likewise, individuals in danger of losing mental

way/2015/10/05/446115171/california-governor-signs-physician-assisted-suicide-bill-into-law [https://perma.cc/5KQR-U77R].

¹⁵² *Id.*

¹⁵³ *Introduction to California End of Life Option*, UCLA HEALTH, <https://www.uclahealth.org/introduction-to-ca-end-of-life-option-act> [https://perma.cc/JKE8-ZJ2H] (last visited Oct. 4, 2022).

¹⁵⁴ *Death with Dignity States 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/death-with-dignity-states> [https://perma.cc/5KCJ-68RL] (last visited Oct. 4, 2022).

¹⁵⁵ *Id.*

¹⁵⁶ [2019] Q.C.C.S. 3792 (Can.).

¹⁵⁷ *Id.* at para. 12.

¹⁵⁸ *Medical Assistance in Dying*, *supra* note 82.

¹⁵⁹ *Id.* (noting that mental illness does not currently satisfy the requirement, but protocols are being created to allow it starting in 2023).

¹⁶⁰ *Id.*

capacity can waive the requirement that they must give final consent to their death.¹⁶¹

The recent past has seen not only important legal changes but a significant increase in the numbers of people ending their lives with medical assistance. Canada saw a seven-fold increase in MAiD deaths in just four years:

2016	1,015
2017	2,833
2018	4,467
2019	5,631 ¹⁶²
2020	7,595 ¹⁶³

The number of individuals taking their own lives under Death with Dignity laws has increased in the United States as well. For example, in Oregon, the state with the nation's oldest Death with Dignity law, 1,905 Death with Dignity participants died from 1998 to 2020.¹⁶⁴ In 1998, 16 individuals took their own lives.¹⁶⁵ In 2020 that number had risen to 245, which was by far the highest number ever.¹⁶⁶ In California, 1,816 persons took their lives under the new law from 2016 to 2020, with 435 doing so in 2020.¹⁶⁷

¹⁶¹ *Id.*

¹⁶² First Annual Report on Medical Assistance in Dying in Canada 2019, Health Can. 18 (July 2020), <https://www.canada.ca/content/dam/hc-sc/documents/services/medical-assistance-dying-annual-report-2019/maid-annual-report-eng.pdf>.

¹⁶³ Joan Bryden, *Medically Assisted Deaths Rose by 17% in 2020, Continuing Upward Trend: Health Canada*, GLOB. NEWS (June 8, 2021 12:01 AM), <https://globalnews.ca/news/7930055/assisted-dying-statistics-2020/> [https://perma.cc/WZB7-4TJA].

¹⁶⁴ PUBLIC HEALTH DIVISION, CENTER FOR HEALTH STATISTICS, OREGON DEATH WITH DIGNITY ACT 2020 DATA SUMMARY, OR. HEALTH AUTH. 5 (Feb. 26, 2021), <https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/year23.pdf> [https://perma.cc/W3VV-ASHS].

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ CALIFORNIA END OF LIFE OPTION ACT 2020 DATA REPORT, CAL. DEP'T OF PUB. HEALTH 3 (July 2021), https://www.cdph.ca.gov/Programs/CHSI/CDPH%20Document%20Library/CDPH_End_of_Life_Option_Act_Report_2020_FINAL.pdf [https://perma.cc/JR87-8653].

The Netherlands and Belgium have gone much further than Canada and the United States in expanding end-of-life options. More than permitting medical assistance in dying, these nations permit euthanasia.¹⁶⁸

The Netherlands was the first nation in the world to legalize euthanasia.¹⁶⁹ It tolerated the practice as early as 1985 and passed a “makeshift law” in 1994.¹⁷⁰ In 2002, it decriminalized physician-assisted suicide and voluntary euthanasia.¹⁷¹ Under the 2002 law, a doctor may administer life-ending drugs to a patient—or facilitate the patient self-administering these drugs—who faces unbearable suffering with no prospect of improvement.¹⁷² The law creates a legal privilege for doctors to terminate patients’ lives when they comply with specific requirements of due care, especially making sure their patients make informed decisions based on their condition and treatment options.¹⁷³ Euthanasia requests must be voluntary and well-considered.¹⁷⁴

Belgium also first legalized euthanasia in 2002, just months after the Netherlands law took effect.¹⁷⁵ Belgian law requires individuals wishing to end their lives to be legally competent and make a “well-considered” and repeated request.¹⁷⁶ They must suffer from a disease that causes “constant and unbearable physical or mental suffering that cannot be alleviated,”

¹⁶⁸ See A. Stef Groenewoud et al., *Euthanasia in the Netherlands: A Claims Data Cross-Sectional Study of Geographic Variation*, *BMJ SUPPORTIVE AND PALLIATIVE CARE* 1, 1 (Jan. 14, 2021), <https://spcare.bmj.com/content/bmjspcare/early/2021/01/12/bmjspcare-2020-002573.full.pdf>. Euthanasia, also known as Physician Assisted Dying, “is defined as a physician providing, at the patient’s request, a prescription for a lethal dose of medication that the patient can self-administer by ingestion, with the explicit intention of ending life.” *Statement on Physician Assisted Dying*, *AM. ACAD. OF HOSPICE AND PALLIATIVE MED.* (June 24, 2016), [http://aahpm.org/positions/pad#:~:text=Physician%2DAssisted%20Dying%20\(PAD\),explicit%20intention%20of%20ending%20life](http://aahpm.org/positions/pad#:~:text=Physician%2DAssisted%20Dying%20(PAD),explicit%20intention%20of%20ending%20life) [<https://perma.cc/5MJL-CHQA>].

¹⁶⁹ Groenewoud et al., *supra* note 167.

¹⁷⁰ *Id.*

¹⁷¹ Marianna Orlandi, “*Love Them to Death*”: *Dutch and Italian Experiences of (Assisted) Suicide, and the Urgent Need for Human Solidarity*, 35 *ISSUES L. & MED.* 131, 132 (2020).

¹⁷² *Id.* at 139.

¹⁷³ *Id.*; Mason L. Allen, *Crossing the Rubicon: The Netherlands’ Steady March Toward Involuntary Euthanasia*, 31 *BROOK. J. INTL. L.* 535, 548-49 (2006).

¹⁷⁴ Orlandi, *supra* note 170, at 139; Allen, *supra* note 172, at 551.

¹⁷⁵ Toni C. Saad, *Euthanasia in Belgium: Legal, Historical and Political Review*, 32 *ISSUES IN L. & MED.* 183, 183 (2017).

¹⁷⁶ *Id.* at 192.

which results from “a serious and incurable disorder caused by illness or accident.”¹⁷⁷ This disorder need not be a terminal illness. Under the law, physicians have put to death persons suffering from depression, schizophrenia, Asperger syndrome, and a condition that would ultimately result in blindness.¹⁷⁸ The individuals suffering from the eye condition were 45-year-old identical twins who “lost their will to live.”¹⁷⁹

Strikingly, both the Netherlands and Belgium allow euthanasia for terminally ill children of any age.¹⁸⁰ Under Belgian law, the child must “be terminally ill, face ‘unbearable physical suffering’ and make repeated requests to die.”¹⁸¹ Parents, doctors, and psychiatrists must agree before the euthanasia of a child is allowed.¹⁸² Netherlands law requires the consent of parents and at least two doctors, and the patient must face “unbearable and endless suffering.”¹⁸³

As in North America, the number of individuals whose lives have ended through assisted suicide and euthanasia has increased dramatically in recent years. In the Netherlands, there were 1,933 cases of euthanasia and assisted suicide in 2005; there were 6,361 in 2019.¹⁸⁴ In 2019, 4.2% of all deaths nationwide were from euthanasia and assisted suicide.¹⁸⁵

¹⁷⁷ *Id.*; see also *Belgium Euthanasia: Three Doctors Cleared in Landmark Trial*, BBC (Jan. 31, 2020), <https://www.bbc.com/news/world-europe-51322781> [<https://perma.cc/2Z4A-5MG7>].

¹⁷⁸ Lieve Thienpont et al., *Euthanasia Requests, Procedures, and Outcomes for 100 Belgian Patients Suffering from Psychiatric Disorders: A Retrospective, Descriptive Study*, *BMJ OPEN* 1, 5 (July 27, 2015), <https://bmjopen.bmj.com/content/bmjopen/5/7/e007454.full.pdf> [permalink]; Charles Lane, *Europe’s Sinister Expansion of Euthanasia*, *WASH. POST* (Aug. 19, 2015), https://www.washingtonpost.com/opinions/euthanasias-slippery-slope/2015/08/19/4c13b12a-45cf-11e5-8ab4-c73967a143d3_story.html [<https://perma.cc/M63E-4WCM>].

¹⁷⁹ Lane, *supra* note 177.

¹⁸⁰ *Netherlands Backs Euthanasia for Terminally Ill Children Under-12*, BBC NEWS (Oct. 14, 2020), <https://www.bbc.com/news/world-europe-54538288> [<https://perma.cc/3ANH-T3GT>] [hereinafter *Netherlands Backs Euthanasia*]; *Belgium Parliament Votes Through Child Euthanasia*, BBC NEWS (Feb. 13, 2014), <https://www.bbc.com/news/world-europe-26181615> [<https://perma.cc/XFZ2-BRE4>] [hereinafter *Belgium Parliament Votes*].

¹⁸¹ *Belgium Parliament Votes*, *supra* note 179.

¹⁸² *Id.*

¹⁸³ *Netherlands Backs Euthanasia*, *supra* note 179.

¹⁸⁴ Groenewoud et al., *supra* note 167.

¹⁸⁵ *Id.*

Belgium saw an eight-fold increase in euthanasia/assisted suicide cases in the first decade after the practice became legal.¹⁸⁶ Use continues to rise. The 2020 government report on the practice revealed a 12.6% increase in the number of reported assisted deaths between 2018 and 2019.¹⁸⁷ There were 954 assisted deaths in 2010, 2,357 in 2018, and 2,656 in 2019.¹⁸⁸

The reported data reveal some strong trends in the laws and practices relating to assisted death. In almost all jurisdictions, the cases of assisted suicide or euthanasia have increased consistently and dramatically after legalization.¹⁸⁹ Outside of the United States, where every state legalizing assisted suicide requires a terminal diagnosis before the practice is permitted, nations like Canada, the Netherlands, and Belgium no longer require a terminal condition.¹⁹⁰ Any condition may be the predicate for death

¹⁸⁶ Madeline Kennedy, *Euthanasia Rising in Belgium, Including More Who are Not Terminally Ill*, REUTERS HEALTH (Sept. 15, 2016, 9:25 PM), <https://www.reuters.com/article/us-health-euthanasia-belgium/euthanasia-rising-in-belgium-including-more-who-are-not-terminally-ill-idUSKCN11M03D> [<https://perma.cc/J4LB-AL9G>].

¹⁸⁷ C. du Bus, *Euthanasia in Belgium: Analysis of the 2020 Commission Report*, EUR. INST. OF BIOETHICS (Nov. 16, 2020), <https://www.ieb-eib.org/en/news/end-of-life/euthanasia-and-assisted-suicide/euthanasia-in-belgium-analysis-of-the-2020-commission-report-1921.html> [<https://perma.cc/6JZ2-3MSU>].

¹⁸⁸ *Id.*

¹⁸⁹ See Nancy Valko, *Why are Suicide Rates Climbing After Years of Decline?*, 84 LINACRE Q. 108, 108 (2017) (noting U.S. suicide increases); *In Places Where it's Legal, How Many People are Ending Their Lives Using Euthanasia?*, CONVERSATION, <https://theconversation.com/in-places-where-its-legal-how-many-people-are-ending-their-lives-using-euthanasia-73755> [<https://perma.cc/S3B2-HX9D>] (Feb. 27, 2019, 5:14 PM) (noting countries that have seen increases in euthanasia over the years); *but see* Gardner, *Dutch Euthanasia Rates Steady After Legalization*, ABC NEWS (Mar. 23, 2008), <https://abcnews.go.com/Health/Healthday/story?id=4506995&page=1> [<https://perma.cc/D539-9MHK>] (noting that Dutch rates remained mostly unchanged after legalization).

¹⁹⁰ See *'Death With Dignity' Laws by State*, FINDLAW (May 24, 2018), <https://www.findlaw.com/healthcare/patient-rights/death-with-dignity-laws-by-state.html> [<https://perma.cc/35YZ-UCLF>] (noting requirement of terminal condition in US states); Mark S. Komrad, *Oh, Canada! Your New Law Will Provide, Not Prevent, Suicide from Some Psychiatric Patients*, PSYCHIATRIC TIMES (June 1, 2021), <https://www.psychiatrictimes.com/view/canada-law-provide-not-prevent-suicide> [<https://perma.cc/67RZ-74QG>] (noting countries that do not require a terminal condition).

if there is a sufficient level of suffering.¹⁹¹ Significantly, that suffering need not be physical.¹⁹² Another noteworthy development is that psychological suffering may now be the predicate for assisted suicide.¹⁹³ And in the Netherlands and Belgium, assisted suicide may be used for adults as well as children of any age.¹⁹⁴

2. *Danger to Vulnerable Individuals from the Attributive View of Human Dignity*

The attributive view of dignity fuels advocacy for the expansion of assisted suicide and euthanasia described in the previous section. It maintains that individuals may or may not have dignity. Dignity can be diminished or even lost, especially in situations of pain, suffering, and loss of physical or mental function or independence. Above all, the argument for assisted suicide and euthanasia is rooted in the conviction that autonomy is key to dignity. Dignity requires one to be able to choose when and how to die. To be denied this choice is to lack dignity. The very name of the laws passed in recent years in the United States attest to this: Death with Dignity.

The attributive view is embraced by many physicians who may be asked to play a front-line role in jurisdictions allowing physician-assisted suicide. In 2009, an enlightening survey was conducted of 1,895 physicians of all specialties.¹⁹⁵ 1,032 of the eligible physicians (or 54%) responded.¹⁹⁶ Of that group, 90% reported that “the concept of human dignity has practical relevance for clinical medicine.”¹⁹⁷ When presented with an end-of-life scenario where an elderly patient was bedbound and suffered from dementia, uncontrolled pain, and little social support, 36% believed the patient had lost all of her dignity; 43% believed she had lost some dignity, but a minimal level remained.¹⁹⁸ 73% of respondents believed that dignity “comes from the ability to make significant choices about one’s life.”¹⁹⁹

¹⁹¹ Sarah Mroz et al., *Assisted Dying Around the World: A Status Quaestiois*, 10 ANNALS OF PALLIATIVE MED. 3540, 3547 (2020).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 3551.

¹⁹⁵ Antiel et al., *supra* note 19.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (noting that physicians were by no means unanimous on the meaning of dignity. Survey respondents were deeply split over whether all humans possess the same amount of dignity. *Id.* Fifty-three percent agreed; 47% disagreed. *Id.*).

The Quebec Superior Court made the attributive view of dignity the centerpiece of its decision in *Truchon v Canada* as well.²⁰⁰ The court highlighted the applicant's desire to exercise fundamental choices concerning his life and death in striking down Canada's MAiD law requirement that individuals must be suffering from a terminal condition.²⁰¹ Because of that requirement, "he is deprived of the exercise of these choices essential to his dignity as a human being due to his personal characteristics that the challenged provision does not consider."²⁰²

Despite its widespread acceptance, applying the attributive view of dignity to the end-of-life decisions poses grave dangers to vulnerable individuals and threatens their fundamental human rights.

a. End-of-Life and Disability

There is a manifest connection between these end-of-life issues and the protection of people with disabilities discussed earlier. Indeed, many arguments made by Death with Dignity supporters fly in the face of the rationale for disability rights. The implicit—and sometimes explicit—premise of Death with Dignity is that lives with disability and loss of independence are not lives worth living. Such lives lack dignity. As Lara Schwartz notes, Death with Dignity "is a concept that places value on some ways of being (ambulatory, verbal, capable of performing daily functions without assistance), and declares other lives—disabled lives—as 'undignified.'"²⁰³

In the 2017 case of *Myers v. Schneiderman*, the New York Court of Appeals considered a challenge to the state's ban on physician-assisted suicide.²⁰⁴ Recognizing the challenge's threat to the rights of disabled individuals, the advocacy group Not Dead Yet filed an amicus brief supporting the ban.²⁰⁵ They wrote that while the plaintiffs challenging the ban

use the term "dignified death" to justify assisted suicide, . . . the "indignities" nondisabled (and some newly disabled) people invariably describe are the need for

²⁰⁰ See [2019] Q.C.C.S. 3792, para. 725 (Can.).

²⁰¹ *Id.* at para. 582-87.

²⁰² *Id.* at para. 681.

²⁰³ Lara Schwartz, *Advocates of Dignity Can Do Better Than Death*, 3 SAVANNAH L. REV. 185, 187 (2016).

²⁰⁴ *Myers v. Schneiderman*, 85 N.E.3d 57, 60 (N.Y. 2017).

²⁰⁵ *Id.* at 59.

assistance in daily activities like bathing, dressing, and other realities of having a disability. Legalizing assisted suicide enshrines in law the prejudice that death is preferable to receiving the assistance that many disabled people rely on.²⁰⁶

Indeed, reports from jurisdictions that allow assisted suicide or euthanasia make clear that individuals generally do not request assisted suicide because of pain. They do so because they fear disability that may limit independence or autonomy. In its 2020 annual report on the practice of assisted suicide in the state, Oregon reported that 32.7% of individuals who took their lives under the Death with Dignity law cited a lack of pain control as a reason for their decision.²⁰⁷ By contrast, 53.1% expressed fear of becoming a burden to their families.²⁰⁸ An astounding 93.1% conveyed a fear of losing autonomy.²⁰⁹

Oregon's experience shows that most individuals taking their own lives act, at least in part, out of fear of suffering disabilities that take away autonomy and cause dependence on others. Reacting to the data in Oregon's 2020 report, the Disability Rights Education and Defense Fund concluded:

Fear, bias, and prejudice against disability play a significant role in assisted suicide. Who ends up using assisted suicide? Supporters advocate its legalization by suggesting that it is needed for unrelievable pain and discomfort at the end of life. But the overwhelming majority of the people in Oregon who have reportedly used that state's assisted suicide law wanted to die not because of pain, but for reasons associated with disability.²¹⁰

Oregon's experience is not unique. Washington's 2020 annual assisted suicide report reveals similar results. When asked why they were taking the drugs that would end their lives, only 38.4% cited pain concerns.²¹¹ Instead,

²⁰⁶ *Id.* at 84.

²⁰⁷ OREGON DEATH WITH DIGNITY ACT 2020 DATA SUMMARY, *supra* note 163, at 12.

²⁰⁸ *Id.* In 2019, 59.2% cited this concern as a motivation for their actions. *Id.*

²⁰⁹ *Id.*

²¹⁰ *Why Assisted Suicide Must Not Be Legalized*, DISABILITY RTS. EDUC. & DEF. FUND, <https://dredf.org/public-policy/assisted-suicide/why-assisted-suicide-must-not-be-legalized/> [<https://perma.cc/4KT9-NKJB>] (last visited Oct. 4, 2022).

²¹¹ 2020 DEATH WITH DIGNITY ACT REPORT, WASH. STATE DEP'T OF HEALTH 10 tbl.3 (2020), <https://doh.wa.gov/sites/default/files/2022-02/422-109->

(continued)

89.6% were motivated by loss of autonomy, 74.8% were motivated by loss of dignity, and 58.6% were motivated by being a burden on family, friends, and caregivers.²¹²

These statistics are troubling. We disparage the experience of millions of disabled individuals if we accept the notion that a disabled life or life dependent to some degree on others is not worth living—is not a life with dignity. All persons have dignity, even those who suffer pain or the loss of independence or certain bodily or mental functions. To hasten death in such situations fails to honor the inherent dignity of the suffering individual.

Significantly, statistics show that individuals with disabilities—once they have adjusted to those disabilities—have satisfaction levels equivalent to those without disabilities.²¹³ A good example comes from the experience of individuals who have suffered traumatic spinal cord injuries. Testifying against the expansion of Canada’s MAiD law, Dr. Catherine Ferrier, President of Physicians’ Alliance Against Euthanasia, reported that while the suicide rate rises dramatically immediately after an individual suffers a traumatic spinal cord injury, it drops back to levels in the general population after five years.²¹⁴ She explained that for newly injured patients, “their options have been tragically narrowed, and it takes time to readjust. But people do.”²¹⁵ She urged that rather than helping such individuals to take their own lives, society should be protecting them from despair and showing them that they can lead meaningful and productive lives.²¹⁶

b. End-of-Life and Voluntary Choice

An unstated assumption underlying the push for assisted suicide and euthanasia is that whatever motivates individuals to end their lives, even if it is fear of disability and dependence on others, they make that decision voluntarily. Sadly, it is increasingly clear that this is not always true.

DeathWithDignityAct2020.pdf. This is the most recent report released by the Washington State Department of Health.

²¹² *Id.*

²¹³ Christel M. C. van Leeuwen et al., *Life Satisfaction in People with Spinal Cord Injury During the First Five Years After Discharge from Inpatient Rehabilitation*, 34 *DISABILITY AND REHAB.* 76, 76 (2012); *A Point of View: Happiness and Disability*, BBC (June 1, 2014), <https://www.bbc.com/news/magazine-27554754> [<https://perma.cc/LR4W-AC5X>].

²¹⁴ Rachel Emmanuel, *Experts Caution Against Expanding Medical Assistance in Dying*, *IPOLITICS* (Nov. 12, 2020, 5:36 PM), <https://ipolitics.ca/2020/11/12/experts-caution-against-expanding-medical-assistance-in-dying/> [<https://perma.cc/JZR3-JC93>].

²¹⁵ *Id.*

²¹⁶ *Id.*

For many individuals who consider assisted suicide, there is subtle—or even overt—pressure to take their lives. Indeed, one of the reasons the United States Supreme Court has held that states may prohibit assisted suicide is “protecting vulnerable people from . . . psychological and financial pressure to end their lives.”²¹⁷ The UN Human Rights Committee expressed the same concern in 2001 when it warned that the Netherlands proposed euthanasia law—now the Termination of Life on Request and Assisted Suicide (Review Procedures) Act—could place “undue pressure” on individuals to take their lives.²¹⁸

In 2015, during a debate over euthanasia in the United Kingdom, nearly 80 doctors wrote an open letter to the *Telegraph* warning that the proposed law could “devalue the most vulnerable in society.”²¹⁹ They reported that they “regularly encounter” patients who “are under pressure from within to remove themselves as a burden on their hard-pressed families.”²²⁰ They also noted that pressure sometimes comes from others: “We do from time to time come across cases where there are signs of subtle pressures being exerted.”²²¹

The pressure exerted on individuals to end their lives is not just speculation. In 2019, the Special Rapporteur on the Rights of Persons with Disabilities engaged in a mission to Canada.²²² In her comments after the visit, Catalina Devandas-Aguilar stated: “I have further received worrisome claims about persons with disabilities in institutions being pressured to seek medical assistance in dying, and practitioners not formally reporting cases involving persons with disabilities.”²²³

With the high expense of end-of-life care, some pressure is inevitable: as much as 25% of all Medicare expenses in the United States are for patients

²¹⁷ *Vacco v. Quill*, 521 U.S. 793, 808-09 (1997).

²¹⁸ Orlandi, *supra* note 170, at 137.

²¹⁹ The Telegraph, *Assisted Death Is Slowly Turning into a ‘Fashionable’ Cause*, BUS. INSIDER (Aug. 25, 2015, 12:48 AM), <https://www.businessinsider.com/assisted-death-is-slowly-turning-into-a-fashionable-cause-2015-8> [<https://perma.cc/Q5SJ-5N7G>].

²²⁰ *Id.*

²²¹ *Id.*

²²² *End of Mission Statement by the United Nations Special Rapporteur on the Rights of Persons with Disabilities, Ms. Catalina Devandas-Aguilar, on Her Visit to Canada*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (Apr. 12, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24481> [<https://perma.cc/H8RW-Y7WV>].

²²³ *Id.*

in the last six months of their lives, for example.²²⁴ Those who take their lives through Death with Dignity laws in the United States feel it. And that pressure is increasing. In 1998 in Oregon, 13% of reported cases of assisted suicide resulted, at least in part, from individuals' desire not to be a burden on their families.²²⁵ That percentage had grown nearly five-fold to 59.2% in 2020.²²⁶ In Washington's 2018 annual report, 51% of those who took their lives under the state's Death with Dignity law were motivated, at least in part, by concerns over being a burden on family, friends, and caregivers.²²⁷

Canadians, too, worry that pressure may drive individuals to take their lives. In a 2020 Angus Reid Institute poll, 65% of respondents feared that expanding MAiD "would result in the elderly and the disabled feeling pressured to choose death so as not to burden others."²²⁸ Indeed, a recent Canadian annual report shows that 34% of individuals seeking medical assistance in dying cite the desire to avoid being a burden on others as a reason for their decision.²²⁹

The danger of pressure being brought to bear on end-of-life decisions is even greater in jurisdictions that allow euthanasia as well as assisted suicide. As Dr. Marianna Orlandi notes, "[S]ince the physician can himself suggest euthanasia, the influence that such an opinion can have on the mind of a patient, whose life and wellbeing fully depend on his doctor, can hardly be overestimated."²³⁰

The concern over whether consent to euthanasia is truly voluntary is particularly pressing for two groups of people: those suffering psychological impairments and children. Regarding psychological impairments, Canadians participating in the Angus Reid poll referenced above expressed grave concern over pressure on individuals with such impairments.²³¹ Sixty-nine

²²⁴ Ian Duncan et al., *Medicare Cost at End of Life*, 36 AM. J. HOSPICE & PALLIATIVE MED. 705, 706 (2019) [<https://perma.cc/K38L-QND5>].

²²⁵ ARTHUR E. CHIN ET AL., OREGON'S DEATH WITH DIGNITY ACT: THE FIRST YEAR'S EXPERIENCE, OR. HEALTH DIV. CTR. FOR DISEASE PREVENTION AND EPIDEM. 16 tbl.3 (1999), <https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/year1.pdf> [<https://perma.cc/GS8P-5GJY>].

²²⁶ OREGON DEATH WITH DIGNITY ACT 2020 DATA SUMMARY, *supra* note 163, at 12.

²²⁷ 2020 DEATH WITH DIGNITY ACT REPORT, *supra* note 210, at 11.

²²⁸ Emmanuel, *supra* note 213.

²²⁹ FIRST ANNUAL REPORT ON MEDICAL ASSISTANCE IN DYING IN CANADA 2019, *supra* note 162, at 34.

²³⁰ Orlandi, *supra* note 170, at 140.

²³¹ Emmanuel, *supra* note 213.

percent believe expanding the availability of MAiD “will cause people with mental illness like depression to choose death rather than deal with the underlying cause of their condition.”²³²

What is a fear in Canada is a reality in Belgium and the Netherlands. In 2020, Belgium reported in its annual euthanasia report that 57 people who had been euthanized identified a psychological disorder as the condition that led them to seek euthanasia.²³³ Those disorders included depression, bipolar symptoms, personality and behavioral disorders, schizophrenia, and autism.²³⁴ Another 48 people suffered from cognitive disorders such as “dementia syndromes.”²³⁵ The vast majority of these individuals—43—were not expected to die soon.²³⁶ But they found their cognitive disorder to be unbearable and chose to take their own lives.

Doctors Scott Y. H. Kim, Raymond De Vries, and John Peteet studied cases of euthanasia in the Netherlands between 2011 and 2014.²³⁷ They found that there, too, many individuals requesting euthanasia suffered from treatable psychological conditions.²³⁸ Patients sought death when their underlying condition was depression, schizophrenia, or even just loneliness.²³⁹ Patient notes reflect one individual receiving euthanasia when: “The patient indicated that she had had a life without love and therefore had no right to exist.”²⁴⁰ In 24% of the cases, the research team found disagreements among the consulting doctors—about things like whether the condition was unbearable with no prospect of improvement or whether the patient’s request was voluntary and well-considered.²⁴¹ But euthanasia took place nonetheless.

Dr. Kim, a psychiatrist and ethicist with the National Institutes of Health, later shared his concern with what he calls psychiatric euthanasia occurring under such circumstances: “In the end, one does not need to be a psychiatrist to appreciate how psychiatric disorders, especially when severe

²³² *Id.*

²³³ C. du Bus, *supra* note 186.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Scott Y. H. Kim et al., *Euthanasia and Assisted Suicide of Patients with Psychiatric Disorders in the Netherlands 2011-2014*, 73 JAMA PSYCHIATRY 362, 362 (2016).

²³⁸ *Id.* at 367.

²³⁹ *Id.* at 365, 367.

²⁴⁰ *Id.* at 365 (reporting that in another case “[t]he patient was an utterly lonely man whose life had been a failure.”).

²⁴¹ *Id.*

enough to lead to euthanasia requests, could interfere with a patient's ability to make 'voluntary and well considered' decisions[.]”²⁴²

Similar concerns exist with the euthanasia of minors. As noted above, both the Netherlands and Belgium allow euthanasia and assisted suicide for children of any age. As Justice Fahey pointed out in *Myers v. Schneiderman*, this raises serious concerns about whether assisted death decisions for minors are genuinely voluntary and well-considered:

The expansion of euthanasia to children needs little commentary. Our society recognizes that minors “are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified or firmly adopted” (People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682, 687–688, 385 N.Y.S.2d 518, 350 N.E.2d 906 [1976]). The immaturity of children makes them especially vulnerable. The Dutch extension of euthanasia to minors is further proof that it is reasonable to fear the consequences of legalizing physician-assisted suicide.²⁴³

The rise in mental health disorders and suicide among the young makes euthanasia of minors particularly concerning. It is estimated that 17% of U.S. children aged 6 to 17 experience a mental health disorder.²⁴⁴ In 2017, a Pew Research study found that 13% of U.S. teens ages 12 to 17 said they had experienced at least one major depressive episode in the past year.²⁴⁵

²⁴² Scott Kim, *How Dutch Law Got a Little Too Comfortable With Euthanasia*, ATLANTIC (June 8, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/nea-pothoven-and-dutch-euthanasia-system/591262/> [<https://perma.cc/W96R-DDL8>]; see also Zachary A. Feldman, *Suicide and Euthanasia: The International Perspective on the Right to Die*, 104 CORNELL L. REV. 715, 737-38 (2019) (conclusion of commentator Zachary Feldman) (“In granting requests to individuals suffering from depression, schizophrenia, or just loneliness, countries like the Netherlands and Belgium are euthanizing mentally incompetent persons.”).

²⁴³ *Myers v. Schneiderman*, 85 N.E.3d 57, 87 (N.Y. 2017) (Fahey, J., concurring).

²⁴⁴ *Mental Health by the Numbers*, NAT'L ALL. ON MENTAL HEALTH, <https://www.nami.org/mhstats> [<https://perma.cc/R77G-VE83>] (June 2022).

²⁴⁵ A.W. Geiger & Leslie Davis, *A Growing Number of American Teenagers – Particularly Girls – are Facing Depression*, PEW RSCH. CTR. (July 12, 2019), <https://www.pewresearch.org/fact-tank/2019/07/12/a-growing-number-of-american-teenagers-particularly-girls-are-facing-depression/> [<https://perma.cc/WAN2-PH9C>].

This was up from 8% a decade earlier.²⁴⁶ The World Health Organization reports that suicide is now the fourth leading cause of death for adolescents aged 15 to 19.²⁴⁷ In the United States, it is the second leading cause of death for individuals aged 15 to 24.²⁴⁸

Disorders affecting cognition and psychological well-being form a toxic combination with minors' immature intellectual and emotional development in general. Dr. Kim notes that it is even more challenging with minors than adults to determine whether a euthanasia decision is voluntary and well-considered.²⁴⁹ He contends: "The basis for concluding that any teenager with a psychiatric disorder has 'no prospect of improvement' and 'no alternatives' is likely to be uncertain at best."²⁵⁰ Dr. Orlandi agrees. There is "an even higher risk of abuse and mistake for minors, especially when the requesting patient suffers from psychiatric disorders."²⁵¹

To this point, we have only been considering cases where voluntariness is uncertain due to pressure, psychological impairment, age—or a combination. Even more concerning is that it is clear at this point, based on many years of experience with euthanasia in Belgium and the Netherlands, that some deaths are completely involuntary. When the Dutch passed their euthanasia law, the government surveyed doctors to see if involuntary euthanasia took place—where doctors took their patients' lives without the patients' request or consent. Stunningly, it found that involuntary euthanasia took place in approximately 1,000 cases per year.²⁵² Other researchers estimate that the number may have been as high as 6,000.²⁵³

Involuntary euthanasia still takes place. A later study done of 208 deaths involving life-ending drugs in the Flanders region of Belgium between June and November 2007 found that 66 were done without explicit request.²⁵⁴ Belgian nurses report that euthanasia without request happens frequently. In

²⁴⁶ *Id.*

²⁴⁷ *Adolescent Mental Health*, WORLD HEALTH ORG. (Nov. 17, 2021), <https://www.who.int/news-room/fact-sheets/detail/adolescent-mental-health> [<https://perma.cc/G7ZH-NBX3>].

²⁴⁸ *Suicide, NAT'L INST. OF MENTAL HEALTH*, <https://www.nimh.nih.gov/health/statistics/suicide> [<https://perma.cc/AT79-3VAR>] (last visited Oct. 4, 2022).

²⁴⁹ Kim, *supra* note 241.

²⁵⁰ *Id.*

²⁵¹ Orlandi, *supra* note 170, at 142.

²⁵² Allen, *supra* note 172, at 538.

²⁵³ *Id.*

²⁵⁴ Saad, *supra* note 174, at 197.

a 2010 investigative report by the *Daily Mail*, more than one hundred nurses said they had taken part in “terminations without request or consent.”²⁵⁵ Two hundred forty-eight nurses acknowledged that they assisted with procedures to terminate life.²⁵⁶ Of those, 120 said that there were times they did so without consent.²⁵⁷ Investigations into the practice of euthanasia in the Netherlands reveal similar concerns that involuntary euthanasia continues to take place today, even after years of experience with the Netherlands law. A study published in the *New England Journal of Medicine* found that in 2005 alone, 0.4% of all deaths in the Netherlands resulted from the administration of lethal drugs without an explicit request from the patient.²⁵⁸

Hundreds—and perhaps thousands—of lives have been taken illegally. Patients have been killed without their request or even consent. Doctors have decided that their patients’ lives are not worth living.²⁵⁹

The individuals who are most at risk of involuntary euthanasia are those who are already marginalized and vulnerable. Again, Justice Fahey expresses the concern well:

Given an acceptance of physician-assisted suicide and voluntary euthanasia, such practices could come over time to be regarded as cheaper alternatives to medical treatment for the terminally ill, leading to a particular risk of non-voluntary euthanasia when a patient’s socioeconomic disadvantages, uninsured status, and/or dementia or mental

²⁵⁵ Simon Caldwell, *Warning to Britain as Almost Half of Belgium’s Euthanasia Nurses Admit to Killing Without Consent*, DAILY MAIL, <https://www.dailymail.co.uk/news/article-1285423/Half-Belgiums-euthanasia-nurses-admit-killing-consent.html> [<https://perma.cc/JSG6-5KU7>] (June 10, 2010, 2:48 AM).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Agnes van der Heide et. al., *End of Life Practices in the Netherlands Under the Euthanasia Act*, 356 NEW ENG. J. OF MED. 1957, 1960 (May 10, 2007).

²⁵⁹ See Saad, *supra* note 174, at 198 (reviewing the Belgian data, commentator Toni Saad concludes: “At best, then, euthanasia is accelerating without complete government oversight and without adequate engagement from the medical profession. At worst, it could be argued that medical murder is taking place, and the situation is out of hand. Hundreds of lives have been taken unlawfully. It is alarming that this can occur without public outcry or government crackdown. Doctors are, quite literally, as far as concerns the law, getting away with murder.”)

incompetence make it impossible for the patient to advocate vigorously for his or her health care.²⁶⁰

In grave danger of involuntary euthanasia are the elderly and frail and those losing physical and/or mental capacities. These are vulnerable individuals who most need our protection.

The only sure foundation for protecting the lives of the vulnerable and marginalized is to embrace the intrinsic view of dignity. All human lives have worth and dignity. Our neighbors have full worth even if they are frail or elderly. They have dignity even if they suffer from depression, loneliness, or cognitive impairment. They need treatment, care, companionship, and pain management, not an end to their lives.

By contrast, the attributive view of dignity poses grave dangers to the lives of such individuals. They may not demonstrate all the attributes that people like Alberto Giubilini and Francesca Minerva insist are necessary to qualify as fully human²⁶¹; they may not display all the capacities that Peter Singer insists are necessary to demonstrate having full worth.²⁶² They may suffer from cognitive impairment; they may not be able to make long-range plans. They may lack—or feel they lack—autonomy over their bodies, minds, or futures. But they are fully human, and they should be valued and have their lives protected and honored.

IV. CONCLUSION

When Brittany Maynard took her life in 2014, she was confident that if she let her cancer take its course, she would eventually lose her dignity, whether through pain, dependence, or loss of capacity. And she was sure that by advocating for the right to take her own life, she was advocating for the protection of both dignity and human rights. But by embracing the attributive view of dignity, she was asserting a position that instead puts the most vulnerable among us at risk and endangers rights.

When we equate dignity with capacity, achievement, and autonomy, we necessarily devalue the lives of those who do not demonstrate those things—or do not demonstrate them in full. Inevitably, we look at those with disabilities and discount their worth. We make them vulnerable to abuse and discrimination. We create an incentive to offer them lesser protection. We jeopardize the rights of the disabled.

²⁶⁰ *Myers v. Schneiderman*, 85 N.E.3d 57, 83 (N.Y. 2017) (Fahey, J., concurring).

²⁶¹ *See Giubilini & Minerva*, *supra* note 100, at 262.

²⁶² *See Singer*, *supra* note 61, at 567.

And when we apply this view to the end of life, we encourage the taking of human life. We encourage individuals who have disabilities to take their own lives because those lives are not worth living. And some lives are inevitably taken involuntarily, whether through pressure or even direct medical intervention.

Our view of dignity is not simply a matter of academic debate. Whether we view dignity as intrinsic or attributive has life or death implications for the marginalized, devalued, and vulnerable among us. We must stand with the founders of the human rights movement. We must assert again with them that: “All human beings are born free and equal in dignity and rights.”²⁶³ Only by embracing the view that dignity is intrinsic to all humans, regardless of physical or mental condition, will we safeguard the lives and rights of those who most need our protection.

²⁶³ Universal Declaration of Human Rights, *supra* note 11, at art. 1.

