

THE RIGHT TO DIGNITY IN CANADIAN LAW

INSTANTIATING, PRESERVING AND RESTORING DIGNITY

REPORT FROM CIAJ'S 46th ANNUAL CONFERENCE

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By Nathan Afilalo and Sarah Rowe, May 2023

Abstract

This report presents a synthesis of the discussions held at the Canadian Institute for the Administration of Justice's 2022 annual conference on "The Right to Dignity in Canadian Law." The conference provided a forum to analyze the complexities of protecting human dignity within the Canadian legal framework. The report examines key themes including wrongful convictions, treatment of inmates, and systemic discrimination against marginalized groups, specifically older people, Indigenous Peoples, and individuals with disabilities. The report addresses the challenges and opportunities in upholding dignity across the Canadian carceral, medical and child protection systems. Furthermore, it explores the complexities surrounding the discourse on dignity, particularly in relation to its definition as a legal right. Additionally, it sheds light on the discursive effect of using vulnerability as a lens to unravel the relationship and disparity between a person whose dignity is infringed and the agents or systemic causes that led to it. Finally, through this exploration, the report seeks to foster a deeper understanding of the significance of dignity within the realm of law.

Instantiating, Preserving and Restoring Dignity

Report From CIAJ's Annual Conference on The Right to Dignity in Canadian Law

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Preamble

This report is based on the discussions that took place at the Canadian Institute for the Administration of Justice's 46th Annual Conference, entitled "The Right to Dignity in Canadian Law." The event was held in person at the Halifax Marriott Harbourfront Hotel and online, from October 26–28, 2022. It brought together some 30 speakers, key actors and members of the legal profession and from other fields across Canada. The conference addressed dignity as a fundamental human right. The nine panels and speakers explored the concept of dignity from a variety of perspectives, including moral and philosophical, and its application as a legal norm. The program is available on this page: https://ciaj-icaj.ca/wp-content/uploads/events/2021/02/brochure_2022-annual-conference_en.pdf

Purpose

In the decision *Ward v Quebec*,¹ the Supreme Court was divided on whether the remarks of a comedian made at the expense of a child with a disability infringed the latter's right to the "safeguard" of his dignity. The majority noted in its decision, "Once the concept of dignity leaves the realm of values and moves into the realm of legal norms, many difficulties arise in its application."² In its remarks on dignity, the majority is walking on well-trodden ground. In the Supreme Court's own jurisprudence, dignity has proven problematic. Nevertheless, the remark seems to suggest a threefold framework for analyzing "dignity":

- (1) What does dignity mean as a value;
- (2) What does dignity mean as a legal norm; and
- (3) Why does the move from value to legal norm create tension?

In short, what are we invoking when we use or call upon dignity?

At the CIAJ conference on "The Right to Dignity in Canadian Law" the conversations on dignity both included and moved well beyond the triptych suggested above. Rather, the panellists discussed dignity much more practically than theoretically. The wide breadth of topics provided concrete forums within which to observe the role of dignity. Panellists addressed systemic ableism and ageism in the Canadian medical and legal systems, the indignities suffered by Indigenous people in the Canadian carceral system, and the phenomena of wrongful convictions, as well as the medical assistance in dying framework in Canada.

Due to the breadth of these issues, it is beyond the scope of this report to remark on each topic. This report is intended to highlight both how dignity was discussed at the conference, as well as the practical insights provided to instantiate, preserve or restore dignity. Nearly all panel discussions used "dignity" in the context of a distinct and severe type of harm. The prejudice

¹ *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 (CanLII).

² *Ibid* at 48.

involved was often described as dehumanizing and fundamentally contravening a person's sense of self. While this is a broad definition to begin with, *broadness* or *universality* goes to the very heart of the issue of defining dignity as the discussion below will note. In refining this type of harm, we note that dignity or the "infringement" was conveyed as *a serious or dehumanizing harm produced by a state of vulnerability resulting from a systemic injustice*. In other words, the harm produced was so severe because of the vulnerable state of the person or people harmed. Such vulnerability is the product of systemic injustice, most often expressed in the form of systemic discrimination. At the conference, dignity was raised to point to such harm.

We will use the panel topics to parse this understanding of dignity into its three component parts:

- (1) Harm;
- (2) Vulnerability; and
- (3) Systemic injustice.

Through the discussion of harm, we explore the debates on the substantive meaning of dignity. We draw our attention to the difference between what dignity is called upon to do versus what it can accomplish in law. When focusing on vulnerability, we identify the conditions that can make an act so dehumanizing so as to infringe dignity. The lens of vulnerability draws our attention to the relationship between the parties involved in the harm. Finally, in the discussion of systemic discrimination, we consider mechanisms through which the harm is produced. These mechanisms capture both the notion of *how* a harm is produced—such as through the brutality of an actor or general policies—as well as *why* it is produced—such as implicit biases or values privileged by a system or actor. Through this understanding, dignity highlights the risk and degree of harm that a person can experience due to the discriminatory presuppositions, goals, and values of a system, law, or practice, as well as the actors animating it.

For the purpose of this report, we have distinguished the parts of the discussion specific to Indigenous peoples from the tripartite discussion of harm, vulnerability and systemic discrimination. This is due to the unique ways in which the three themes impact Indigenous peoples. The distinct relationship between Indigenous peoples and Canadian legal structures and societal norms has been well documented by organizations, such as the *Truth and Reconciliation Commission of Canada*, or in the works of the *National Inquiry into Missing and Murdered Indigenous Women and Girls*. The impact of colonialism has been reinforced by state tools such as the *Indian Act* or Residential Schools, and any comment on vulnerability or systemic discrimination relative to issues regarding First Nations, Métis, and Inuit people is further compounded by that history. Therefore, we have separated those issues, though not fully, as they are united by that history that manifests in current day practices.

Finally, in this report we are as concerned with *what dignity refers to* as with *how dignity was used* in discussion at the conference. Given the recent developments in the Supreme Court jurisprudence on dignity, it is helpful to understand the gap between what dignity is called upon to do in law versus what it may actually accomplish as a legal norm. While change may be an inevitable fixture of dignity when used as a norm, such change may not always be equitable. It

is important to understand how people are using a term in the face of an injustice to compare it against how that injustice will be resolved. This report demonstrates the many faces that one word can wear.

Harms and Issues with Dignity as a Norm

The opening panel of the conference sought to contextualize the meaning of dignity in law through three perspectives. The first perspective encompassed the ambiguous meaning of dignity and its use as a legal norm. The participants were asked to consider whether the notion of dignity in law refers to something unique. Does dignity protect a quality not protected by any other legal right?³ Second, the panel explored the converse argument. In light of the above criticism, what can dignity refer to, what qualities are required to make its meaning determinative, and how can such a meaning be expressed in law? The third perspective grounded the discussion, as the panellists explored the use of dignity in the jurisprudence of the Supreme Court of Canada. The history and development of the term show that Canadian judges have struggled to provide a strict definition for dignity despite its near ubiquitous use. Indeed, it seems that dignity has different uses in relation to different legal issues. The value of dignity seems to greatly vary based on the applicable legal issue.

Introduction to Dignity

Much scholarly ink, from the pens of jurists, linguists, philosophers, and otherwise, has been spilled debating the meaning of the word “dignity.” The precise definition of dignity remains up for debate, and its meaning as a legal norm is likewise in dispute.⁴

Dignity’s use as an idea or philosophical concept is much older than its use as a legal right. The term can be traced back to the Roman notion of *dignitas hominis*, referring to the “status” of a person and the honour of respect owed to them.⁵ During the Renaissance, southern European humanists linked dignity with reason and the ability of humans to make choices.⁶ The Enlightenment saw dignity, particularly due to Emmanuel Kant, as treating people as “ends in themselves”: autonomous individuals able to choose their own destiny.⁷ Political philosophers of the 16th and 17th centuries would link dignity with republicanism and equality of rights. Finally, in the 18th and 19th centuries, dignity would become more prominent in European political discourse.⁸

³ LW Sumner, “Dignity Through Thick and Thin” in Sebastian Muders, ed, *Human Dignity and Assisted Death* (Oxford: Oxford University Press) 49 at 50.

⁴ *R v Kapp*, 2008 SCC 41 at paras 21–22 (CanLII).

⁵ Christopher McCrudden, “Human Dignity and Judicial Interpretation of Humans Rights” (2008) 19:4 *Eur J Intl L* at 655 at 656.

⁶ *Ibid* at 659.

⁷ *Ibid* at 660.

⁸ *Ibid* at 662.

Dignity in law emerged in the early 20th century, predominantly in constitutional documents,⁹ where it was framed as a response to the atrocities of the Second World War. However, its proliferation as a legal norm followed the adoption of dignity by the United Nations. In 1948, the UN adopted the *Universal Declaration of Human Rights*, in which article 1 holds, “human beings are born free and equal in dignity and rights.”¹⁰ Dignity was understood as a quality *inherent* to human beings, inalienable and inextricable to their fundamental nature. Ascribing this essential quality to dignity creates tension in its application as a legal right.¹¹

Today and throughout the latter half of the 20th century, dignity has remained a central feature in human rights discourse.¹² The term is often understood as the normative basis of human rights and a tool for interpreting constitutional rights.¹³ As such, it can be found in many national constitutional documents and in their preambles,¹⁴ as well as in international instruments, notably the *United Nations Charter* and the *Universal Declaration of Human Rights*.¹⁵ Dignity is equally prominent in the Canadian human rights landscape. Section 4 of Quebec’s *Charter of Human Rights and Freedoms*¹⁶ set outs an explicit right to the “safeguard of honour, dignity and reputation.” While there is no explicit right to dignity in the Canadian *Charter*, dignity has been understood by the Supreme Court as an underlying value of the *Charter*¹⁷ and that “the protection of all the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity.”¹⁸ Dignity in the context of *Charter* rights has been brought to life through the jurisprudence of the Supreme Court of Canada.

Problems with Dignity in Theory

Speaking on the first panel of the conference, Professors Jacob Weinrib, Cheryl Milne and Wayne Sumner explained that the crux of the tension is whether “dignity” can be said to possess a determinate meaning of its own or if it is instead a redundant term that simply refers to “the respect for persons or for their autonomy.”¹⁹ The debate is not an idle one. The Supreme Court of Canada has on several occasions opined on the problems that arise when employing

⁹ *Ibid* at 664.

¹⁰ *Universal Declaration of Human Rights*, GA Res 217 A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [UDHR]. (not sure if there is a pinpoint here, if not it should be preceded by See)

¹¹ Once the concept of dignity leaves the realm of values and moves into the realm of legal norms, many difficulties arise in its application. See A Gajda, “The Trouble with Dignity”, in Andrew T Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016) 246 at 258–61. See also Kapp, *supra* note 5 at paras 21-22.

¹² McCrudden, *supra* note 6 at 656,

¹³ See Jacob Weinrib, “Human Dignity and its Critics” Gary Jacobson & Miguel Schor, eds, *Comparative Constitutional Theory* (Cheltenham: Edward Elgar, 2018) 167.

¹⁴ *Ibid*.

¹⁵ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.

¹⁶ *UDHR*, *supra* note 11.

¹⁷ See *Charter of Human Rights and Freedoms*, CQLR c C-12.

¹⁸ *R v Oakes*, [1986] 1 SCR 103 at para 136, 50 CR (3d) 1.

¹⁹ *R v Morgentaler*, [1988] 1 SCR 30 at para 166, 62 CR (3d) 1.

dignity as a legal test.²⁰ In *Ward*, the Court was split on its interpretation in a legal test, even while the majority avoided defining dignity.²¹

Professor Sumner illustrated the tension by outlining how dignity struggles to have a meaning of its own. He argued that dignity is used as a placeholder for the value of “worth” and thereby possesses no definite meaning of its own.²² This returns us to the notion of dignity representing the “inherent” value of human beings by virtue of being human, as discussed above. The notion is found in the UN Declaration where the preamble states:

“Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental rights, in the dignity and worth of the human person and in equal rights of men and women...”²³

Sumner explained that the worth of a human person is understandable as a value term encompassing the inherent value of persons. The SCC jurisprudence captures such an understanding of dignity. Professor Milne and Sumner pointed to *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (the “*Motor Vehicle Reference*”), where Lamer J. explained: “that the principles of fundamental justice are derived from the essential elements of our system of justice, which is itself founded on a belief in the dignity and worth of every human person.”²⁴ To deprive a person of constitutional rights arbitrarily or in a way that is overbroad or grossly disproportionate diminishes their worth and dignity. If a law operates in this way, it asks the claimant to “serve as a scapegoat”²⁵ and imposes a deprivation via a process that is “fundamentally unfair” to their rights.²⁶

Charter rights are designed to protect individuals from being used or abused by the state. These rights reinforce the basic idea of “worth”: that persons matter in their own right and deserve protection from being used as ends to advance collective goals advanced by the state. Persons are ends in themselves and this is their “worth.”²⁷ But what does dignity substantively add in reference to the inherent value or worth of human beings? The worst-case scenario, Sumner argued, is that it does not add anything: that dignity is redundant because it repeats the idea of inherent worth or special status, simply adding more gravitas, but nothing more.²⁸

Sumner’s point is not merely relevant for linguists. Weinrib explained the problem it raises. He said that dignity informs us that humans have inherent worth; however, without more, the definition is substantively vacuous as it does not explain how to design dignity or how disputes

²⁰ Sumner, *supra* note 4 at 52.

²¹ See e.g. *Supra* note 1 at para 48.

²² Sumner, *supra* note 4 at 53.

²³ *UDHR*, *supra* note 11 at Preamble.

²⁴ *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at 512, 1985 CanLII 81 (SCC) at 63

²⁵ *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519 at 621, 17 CRR (2d) 193 CanLII).

²⁶ *Carter v Canada (AG)*, 2015 SCC 5 at para 81 citing *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 22.

²⁷ Sumner, *supra* note 4 at 53–55.

²⁸ Sumner, *supra* note 4 at 57.

should be resolved using dignity.²⁹ Without a definite meaning, dignity is a vehicle for arbitrary preferences, and therefore, hollow.³⁰ Weinrib explained that this form cannot bear the burden of dignity as a constitutional principle.

Professor Weinrib illustrated, however, that one cannot ascribe a determinate definition to dignity to solve the problem. Weinrib's remarks asks us to consider dignity as an ideal of human worth, be it through a religious or a secular-ethical lens. For example, we can say that "dignity" means "living according to a set of principles" such as "living a rational life" or living so as to adhere to set principles. In this case, dignity no longer refers to the value of a human being by virtue of itself; rather, the animating idea behind dignity becomes that "human beings have value because they stand in relationship to something else that is valuable."³¹ Dignity through this understanding does not promote humans as humans but rather promotes the ideal that humans should strive towards. This determinacy is freedom effacing as people can be compelled to adhere to the vision captured by dignity's determinate meaning.³² Instead of being provided with an understanding that explains the arrangement of human rights, dignity becomes an ideal that directs individuals to some mandatory end. Humans are thereby instrumentalized and secondary to the promoted goal.

Professor Milne stated that without a definition of dignity, things can get out of control. She noted that dignity has had different uses in relation to different legal issues³³ and is malleable through such different definitions. In *Morgentaler*, dignity encompasses the right to make fundamental decisions, but the reasons go much deeper. In that case, Justice Wilson was the only justice to reference dignity in relation to how women are affected by the abortion provisions. Similarly, *Big M Drug Mart* defines dignity as at the "heart of our democratic political tradition," which underlies the *Charter*,³⁴ but this definition changes in *Bissonnette*, where "the concept of dignity evokes the idea that every person has intrinsic worth and is therefore entitled to respect."³⁵ *Bissonnette* focuses on rehabilitation, control, and the ability to make choices, thus morphing the concept of dignity. In *Law*, "[h]uman dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits."³⁶ This case tries to define dignity in a s. 15 context; however, the legal test for a s.15 infringement eventually changes, as the claimant finding the rights breached has to present evidence to prove a breach of dignity. This shift illustrates Weinrib's point on the perils of framing dignity as a mechanism grounded in an end to promote an ethical framework not centered on the *human being qua human being*.

²⁹ Jacob Weinrib, "Dignity and Autonomy" (2019) Max Planck Encyclopedia Comparative Constitutional L [Weinrib, "Dignity and Autonomy"].

³⁰ *Ibid.*

³¹ *Ibid* at 5.

³² *Ibid.*

³³ (1) absolute prohibitions against torture (*Bissonnette*, *infra note 35*); (2) *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 (CanLII), [2013] 3 SCR 733 at paras 19 and 24

³⁴ *R v Big M Drug Mart*, [1985] 1 SCR 295 at para 122, 18 DLR (4th) 321 (CanLII).

³⁵ *R v Bissonnette*, 2022 SCC 23 at para 59 (CanLII).

³⁶ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 53.

Milne highlighted the fractured Court in *Ward* where the majority and dissenting opinions fundamentally understood dignity according to differing standards. The majority took issue with the easy infringement of dignity in the jurisprudence of s. 4 and s. 10 of the *Quebec Charter*, holding that the imprecise nature of the meaning of dignity results in an:

“...infringement of the right to equal recognition of the right to the safeguard of dignity easier to establish given the fact that dignity is always more or less affected when equality is denied, as the norm of equality flows from dignity.”³⁷

In the majority’s understanding, the low threshold to infringe dignity trivializes the gravity of the concept of dignity.³⁸ The concept emerged in response to the atrocities committed during the 20th century (particularly the Second World War), and as such, the infringing conduct must be of a consummate level of gravity.³⁹ The majority explained that an objective analysis is required to establish if dignity has been infringed, because dignity “is aimed at protecting not a particular person or even a class of persons, but humanity in general.”⁴⁰ This considerably raises the standard, as the perspective of the person harmed—in this case the child—is removed. On the other hand, the dissent, in keeping with the caselaw up to that point, argued that an analysis looking at dignity must consider the perspective of the individual claiming the harm and violation.⁴¹

The tension in *Ward* is an illustration of one of the many issues with the concept dignity. Milne also highlighted that judges tend to look at dignity from their point of view rather than an empathetic point of view. She references *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*⁴² (*CFCYL*) to demonstrate that children have a different concept of dignity, therefore, courts should look at them differently. Children are the only group that can be hit legally, and currently, courts do not consider the protection children’s dignity but consider whether this dignity can be overridden. Milne explained that the objective standard of dignity tries to ensure feelings are not subjectively hurt for trivial behaviour; however, Milne believes this analysis strips dignity of its foundational concepts to make it more objective, requiring claimants to prove the infringement. *CFCYL* considers the dignity of the perpetrating adults, rather than the victims, holding that the rights of the children are not infringed.

Recovering Dignity

Despite its issues, dignity is not so easily thrown away. Sumner set out four conditions to establish a concept of dignity that has a role of its own. First, dignity must have a final meaning or content that is distinct on its own and not the same as other notions of integrity and autonomy. Second, dignity must have a function; it must be able to do something. The only

³⁷ *Ward*, *supra* note 1 at para 53.

³⁸ *Ward*, *supra* note 1 at para 57.

³⁹ *Ibid.*

⁴⁰ *Ibid.*; Fabre-Magnan, at p. 21. (not sure what the second citation is)

⁴¹ *Ward*, *supra* note 4 at 171–72.

⁴² See *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII).

function that Sumner thought for dignity of is explaining the ground of the inherent worth of persons; by virtue of that worth, we possess rights. This definition would mean that individuals have special value or worth by virtue of dignity, which in turn, plays a foundational role in human rights: we have rights by virtue of inherent worth, and we have worth by virtue of our dignity; therefore, dignity supports human rights. Third, the scope of dignity must be universal and equal. Fourth, dignity must have a range that covers all human rights in the *Charter*, not just a specific area. Sumner argued that while legal understandings of dignity capture some of these conditions, they are not all simultaneously captured. He concluded by saying that he remains in a state of skeptical agnosticism, as he does not believe such a concept of dignity is impossible, but it has yet to be found.

In response, Weinrib asserted that the role of dignity is to regulate the relationship between “rulers and ruled.” The subject of dignity is the “basic duty” that “a public authority owes to all who are governed by it.” Dignity arises not because of a specific kind of governance. Rather, “human dignity is the subject of a public duty that attends the governance of human beings as such.”⁴³

He explains: “Human dignity is the most abstract relationship that regulates the relationship between rulers and the ruled. Its subject is the basic duty that a public authority owes to all who are governed by it...Rather human dignity is the subject of a public duty that attends the governance of human beings as such.”⁴⁴

The constitutional concept of dignity concerns the “relationship between free persons and their government,”⁴⁵ arising in any forum of interaction between people and state. Thus, in the context of an individual governed by a democratic state, dignity is inherent, universal, and equal, as it relates to every person under that state, as opposed to being selective: a concept that protects the individual right to choose their own ends.

Constitutional law provides a legal framework for rendering claims of human dignity determinate and capable of resolving disputes. Therefore, dignity needs to have range and must apply to all *Charter* rights. Both Milne and Weinrib explained that the clearest explanation of dignity is in Justice Wilson’s dissent in *Morgentaler*, which gives effect to the totality of the *Charter* provisions (i.e., the right to liberty protecting dignity), while understanding the *Charter* as a systematic whole. Linking dignity and liberty, Justice Wilson explained:

“Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence. The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity.”⁴⁶

⁴³ Weinrib, “Dignity and Autonomy”, *supra* note 30 at 1.

⁴⁴ *Ibid.*

⁴⁵ *Ibid* at 9.

⁴⁶ *Morgentaler*, *supra* note 19 at para 164.

Wilson characterized dignity as the organizing idea of the *Charter*, where different rights are specifications, modalities and instantiations of this ideal. This definition provides an understanding of the inter-relationship between dignity and human rights. Weinrib admitted that a definition encompassing the entire *Charter* may cause different specifications of human dignity to collide and explains that the proportionality analysis must balance dignity-protecting and dignity-effacing factors. Alternatively, proportionality balances the constraint on human dignity with the requirement of equal protection for rights of others. Weinrib stated that infringement for legitimate pressing and substantial objective must be taken seriously, as proportionality is important for human dignity.

Milne highlighted the notions of dignity found in the early jurisprudence of the Supreme Court noting a few fundamental aspects of these principles. In those cases, dignity had a more unified meaning where its use as value was clearer and was expressed as relating to the inherent worth of each individual (foundational of dignity), autonomy and control, recognition and respect (in relation to different groups) and ground or scene for forcing various substantive values (some things are undignified). In *Kapp*, dignity is described as the “lodestar” of the *Charter*,⁴⁷ the ground that covers all *Charter* rights. In *Morgentaler* Justice Wilson held that the *Charter* and the rights to individual liberty it guarantees “are inextricably tied to the concept of human dignity.”⁴⁸ Similarly, in the s. 1 analysis of *Oakes*, “The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person...”⁴⁹ Further, as noted above, in *Big M Drug Mart* dignity is linked to foundational norms undergirding both individual rights and the function of the state.⁵⁰ Milne explained that in many cases, dignity is tagged onto the word free because it is an inherent value or theme in the equality of rights, such as in *Law*, *Kapp*, and *Bissonnette*. Dignity is ubiquitous in terms of its use; it has been affirmed in many decisions, but these decisions are short on definitions, paving the way for interpretative issues as the caselaw develops.

Despite this, in all cases, dignity relates to the profound aspect of being a human in relation to a state. The rights that dignity protects impact individuals as much as they do groups.⁵¹ Dignity finds itself connected to a series of rights that justify, explain and mediate individual rights, as individuals interact with other people in society, as well as instruments of the state.

⁴⁷ *Kapp*, *supra* note 5 at para 21.

⁴⁸ *Morgentaler*, *supra* note 20 at para 164.

⁴⁹ *Oakes*, *supra* note 19 at para 64.

⁵⁰ *Big M Drug Mart*, *supra* note 35 (“because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy of ‘firstness’ of the First Amendment” at para 22).

⁵¹ *Ward*, *supra* note 1 at para 156.

Dignity and Vulnerability

Introduction

The following section will explore dignity in the context of criminal law. The discussion will focus on two issues in particular discussed in panels on the first and second day of the conference respectively:

- (1) Wrongful convictions; and
- (2) Decarceration.

Prior to an examination on how the panellists discussed the issues we take the opportunity to discuss the notion of “losing” one’s dignity and how, using the lens of vulnerability, we can contextualize such a description of harm to an idea of dignity that is inherent, immutable and always present. On both panels dealing with wrongful convictions and debarkation, the notion of “losing” dignity was often used to describe dehumanizing behaviour that infringed dignity. Both panels further highlighted how such behaviour resulted from the vulnerability of an individual from the disparity in power between the harmed individual and forces of the state, be these actors, laws or policies

Contextualizing Vulnerability

Criminal justice law is one of the most coercive forums of interaction between a member of the public and their government. It consists of a series of interconnected processes where, amongst other things, people encounter the forceful hand of the state by being charged, accused, sentenced and imprisoned. Be it for punitive or restorative purposes, the criminal law holds the power to prescribe, through coercive force, how and under what conditions a person will live their life. The disparity in power between the actors is vast.

This disparity is captured by Weinrib’s definition of dignity discussed above: the duty mediating the relationship between the rule and the ruled. Indeed, the vulnerability of the individual before the state in a criminal proceeding is explicitly recognized.⁵² Bringing the inherent power disparity in criminal matters into focus, the topics of wrongful convictions and decarceration provides an opportunity to highlight the theme of dignity and vulnerability. We can turn to the discussion on vulnerability in torts law by Carl F Stychin, “The Vulnerable Subject of Negligence Law” to explore the idea, where Stychin notes that:

“It is important to note that “vulnerability” is not used as a pejorative to suggest weakness. Vulnerability rather describes the relationship between one actor relative to another. Considering a person or group of people as “vulnerable” prompts us to consider what is that the relevant group is vulnerable to? Vulnerability therefore inherently implies a relationship. “Vulnerability provides a discursive means by which to articulate demands

⁵² Oakes, *supra* note 19 at para 29.

for the legal responsibility of those in positions of privilege who otherwise can claim that they have not assumed responsibility and that they are not responsible.”⁵³

By using the lens of “vulnerability,” our attention is drawn to locate the interaction of the relevant parties and the disparity of power that creates a state of vulnerability between one to the other. Used in such a way, vulnerability is a framing device that invites us to look at the concrete interactions between the purposive acts or indeliberate omissions of a person in power, or an institution, and the person subject to them.^{54 55} Vulnerability indicates a person or group’s inability, or limited ability, due to social, political or economic constraints, to avoid risk of injury as consequence of the actions of the actor to whom the person in question is vulnerable.⁵⁶ Using this lens of vulnerability, we can clarify the ethical and legal responsibility that flow from the power or control possessed by one party and the resulting vulnerability to it felt by another.⁵⁷

Vulnerability and Loss of Dignity

Vulnerability does not only help us understand the relationship between parties, but can also help illustrate the severe harm that can result from the power imbalance between parties. Used in this way, the lens of vulnerability facilitates threading the needle between how dignity is discussed in legal theory as being inherent versus how it is invoked when explaining the magnitude of a harm as a loss or deprivation of dignity. Further, we can put the differences between theory and practice aside without harming either if we note that claims of losing dignity speaks to a person’s state of fundamental vulnerability. We can understand “losing dignity” as another discursive tool to highlight a kind of extreme harm that arises from a power imbalance. Given how much stress is put on the indeterminate meaning of dignity as a legal norm and term, it is no less idle or pedantic to explore its common semantic use and invocation.

On its face, the normative understanding of dignity is incompatible with the notion of losing dignity. One cannot lose an inherent and enduring quality. If we return to Weinrib’s understanding of dignity as a public duty, then as a matter of scope, dignity is universal, binding to “all who exercise public authority” and to “all humans being subject to governance of a public authority.”⁵⁸ All humans are thereby equal in dignity, and by virtue of that universality, dignity can neither be dismissed nor augmented.⁵⁹ This universality is maintained in the Supreme Court caselaw where dignity is repeatedly understood as being inherent to the human being:

⁵³ Carl F Stychin, “The Vulnerable Subject of Negligence Law” (2012) 8:3 Intl JL in Context 337 at 350.

⁵⁴ Desmond Manderson, *Proximity, Levinas, and the Soul of Law* (Montreal: McGill-Queen’s University Press, 2006) at 112. (I’m assuming this citation matches the title below)

⁵⁵ *Ibid* at 109, 112.

⁵⁶ Stychin, *supra* note 54 (**Vulnerability** typically is applied “...to situations where ‘by reason of ignorance or social, political, or economic constraints, the plaintiff was not able to protect him or herself from risk or injury” at 345).

⁵⁷ *Ibid* at 345.

⁵⁸ Weinrib, “Dignity and Autonomy”, *supra* note 30 at 1.

⁵⁹ *Ibid*.

“...respect for group identity and the inherent⁶⁰ dignity owed to all human beings.”⁶¹ We cited the inherent quality of dignity to each person as articulated by the UN, which the Court in *Ward* raises to dignity being “...aimed at protecting not a particular person or even a class of persons, but humanity in general,” and the majority continued to say that “[w]here a person is stripped of their humanity by being subjected to treatment that debases, subjugates, objectifies, humiliates or degrades them, there is no question that their dignity is violated.”⁶² Dignity from this perspective remains something transcendent and enduring and cannot properly be said to be lost or recovered.

However, extolling the virtue of dignity to someone who claims to have “lost” their dignity seems callous. When the panellists spoke of individuals or themselves “losing their dignity,” they were relating extreme, dehumanizing and unjust treatment that went to the core of a person’s sense of self-worth. As the harm relates to self-worth, the feeling of losing dignity is fundamentally subjective despite the objective repugnance of the actions in question. Reciting her harrowing experience of being wrongfully convicted of killing her daughter on the morning of the conference’s first day, Maria Shepherd, Principal, Sr. Paralegal & Notary Public, Shepherd Advocacy & Litigation; Co-Director, Innocence Canada described attempts to “strip [her] of [her] dignity.”⁶³ Speaking on the panel discussing decarceration, Patricia Whyte, the Indigenous Peer Support Worker and Residential Manager at the Elizabeth Fry Society illustrates the point in recounting the abuse she suffered while in police custody. Whyte had undergone a C-section shortly prior to her arrest and was left in such a condition that the wound became infected. She was also subjected to strip searches just after giving birth. Whyte explained that after these events, and through her time in prison, she “lost her dignity.” A culmination of maltreatment by force and systemic discrimination against Indigenous people.

When dignity is understood as a duty owed to humans governed by a system due to the serious harm that can be inflicted upon them as a result of their inherent vulnerability to the power of the state, a “loss of dignity” rhetorically captures the enormity of that transgression. We explore and ground this further in the following discussion.

Wrongful Convictions

Wrongful convictions are a profound demonstration of “loss of dignity.” The panellists detailed the types of vulnerability that lead to a loss of dignity by highlighting:

- (1) The severity of a wrongful conviction;
- (2) The systemic factors that contribute to producing wrongful convictions;

⁶⁰ *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 (CanLII), at para. 66; *Ward*, *supra* note 1 at para 65.

⁶¹ *Ward*, *supra* note 1 at para 56.

⁶² *Ibid.*

⁶³ Maria Shepherd, “CIAJ Speech” (Canadian Institute for the Administration of Justice’s 46th Annual Conference, “The Right to Dignity in Canadian Law”, 26 October 2022).

- (3) The extreme difficulty of a person to establish their innocence; and
- (4) The great efforts required to change those factors.

The panellists stressed that people who have been wrongfully convicted undergo a process where their dignity is “lost” and “stripped” away. The process of proving their innocence allows that dignity to be restored; therefore, reforms to the system focused on recognition and accountability should be grounded in restoring the dignity of people with wrongful convictions.

Definition

A wrongful conviction describes a case in which a person is found guilty of a crime they did not commit. It can also include instances where the person in question is improperly found guilty or sentenced due to procedural and evidentiary issues despite not being factually innocent.⁶⁴ The term, “Miscarriages of justice” is sometimes used interchangeably with wrongful convictions; however, it is helpful to distinguish them. “Miscarriages of justice” is the term used in the *Criminal Code* to describe a case in which a wrongful conviction “has been or will be established based on the available evidence.”⁶⁵ This suggests the ministerial process of examining the case of a person claiming a wrongful conviction.⁶⁶ Therefore, “miscarriages of justice” capture the instances where a wrongful conviction is recognized by the state. The term “wrongful convictions,” on the other hand, captures the larger phenomenon of the failure of the criminal law in finding innocent people guilty, whether innocence is publicly recognized or not. Professor Kent Roach pointed out that this includes new insidious kinds of wrongful convictions, people taking strategic guilty pleas, and false confessions.

Tamara Levy, the director of the UBC Innocence Project, explained that it is extremely difficult for a person wrongfully convicted of a crime to establish their innocence. The combination of the practical difficulties of the ministerial process and the social realities of being wrongfully convicted put the person in question in a deeply vulnerable position.

To apply for the Ministerial Review, a person’s rights of judicial review or appeal, with respect to the conviction or finding, must be exhausted.⁶⁷ The Minister of Justice then decides whether “there is a reasonable basis to conclude that a miscarriage of justice likely occurred”⁶⁸ taking into account all “relevant...matters,” such as new evidence that was not available to the courts.⁶⁹ The Minister can dismiss the application, direct a new trial, or refer the case to the

⁶⁴ *Ibid.*

⁶⁵ See *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard*, vol 1 (Regina: Office of the King’s Printer, 2008) at 365–66 [*Milgaard Inquiry*] (for more information on these distinctions).

⁶⁶ *Criminal Code*, RSC 1985, c C-46, ss 696.1–696.5 (Part XXI.1: Applications for Ministerial Review—Miscarriages of Justice). Other legal avenues exist that could potentially be used to address wrongful convictions, such as the pardon power under s. 748 of the *Criminal Code*.

⁶⁷ *Ibid.*, s 696.1(1).

⁶⁸ *Ibid.*, s. 696.3(3).

⁶⁹ *Ibid.*, s 696.4.

Court of Appeal.⁷⁰ Levy explained that the person with the wrongful conviction is then subject to the relevant Crown counsel who can choose to:

- (1) Proceed with a new trial;
- (2) Withdraw the charges;
- (3) Bring a stay of proceedings; or
- (4) Offer no evidence resulting in a verdict of not guilty.⁷¹

Levy stressed that we must map onto this process the practical difficulties in undertaking it. A person undertaking this process will have to live with the hardships of incarceration; therefore, outside aid is essential to find and gather the new evidence required to meet the criteria under s. 696.4. The Honourable Harry Laforme explained that this is particularly so due to the high threshold of requiring applicants to provide new and significant information that establishes, on a “reasonable basis,” that a miscarriage of justice “*likely occurred*.”⁷² The matter is further complicated as wrongful convictions may be produced through erroneous witnesses identification, errors by counsel, or false confessions.⁷³ Such convictions do not usually meet the high bar required to determine that a miscarriage of justice likely occurred, and will therefore, not move beyond the preliminary assessment stage.⁷⁴ The “A Miscarriages of Justice Commission” recommends a lower threshold whereby a “miscarriage of justice *may* have occurred.” They stress that this standard is consistent with best foreign practices and reduces the likelihood of a risk-averse practice, where the Minister only refers cases that are nearly almost always overturned by appellate courts or not prosecuted.⁷⁵

Further, a person wrongfully convicted may live for years with people not believing their claims of innocence. Consequently, that person may not have the logistical, the monetary, or crucially, the financial support of friends and family. This places the person in an extreme state of vulnerability due to the high threshold for compensation. Currently, compensation for a wrongful conviction includes many qualifiers, the most burdensome being that the person was convicted, imprisoned, and determined that factually, they did not commit the offence.⁷⁶ This means that there will be no compensation despite a finding of a miscarriage of justice if the wrongfully convicted is acquitted or if their charges have been withdrawn or stayed.⁷⁷ Levy noted that the requirement for “factual innocence” for compensation has not only been criticized by the Milgaard commission⁷⁸ but also contravenes the *International Covenant on Civil and Political*

⁷⁰ *Ibid*, s 696.3(a)(b).

⁷¹ Kent Roach, *Report Relating to Paragraph 1(f) of the Order In Council for the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (2006).

⁷² *Criminal Code*, *supra* note 67, s 696.3(3).

⁷³ Kathryn Campbell, “Exoneration and Compensation for the Wrongly Convicted: Enhancing Procedural Justice, MMLJ, vol 42, issue 3 at 265.

⁷⁴ *Ibid*.

⁷⁵ Hon Harry LaForme & Hon Juanita Westmoreland-Traoré, *A Miscarriages of Justice Commission* (3 February 2022) at 159–70 (“Referral Grounds and Remedies”) [*Miscarriages of Justice*].

⁷⁶ *Guidelines: Compensation for Wrongfully Convicted and Imprisoned Persons* (adopted by the Federal, Provincial and Territorial Justice Ministers in 1988). (I was not sure which document this is referring to)

⁷⁷ *Miscarriages of Justice*, *supra* note 76 at 159–70.

⁷⁸ *Milgaard Inquiry*, *supra* note 67 at 369.

Rights to which Canada is party, and which requires compensation when a person is found not guilty of a crime in law.

There are further issues of a lack of transparency when it comes to finding miscarriages of justice. The panellists stress that dignity requires public and legal recognition of the wrong suffered at the hands of the state. M^e Levy illustrated with the case of Mr. Yebes.⁷⁹

Mr. Yebes was found guilty of two counts of second-degree murder in the 1980's. In appellate court, the guilty verdict was confirmed, with a strong dissent stating the facts weren't sufficient to support such a pleading. While he served 10 years in prison, his own nephew needed to go to law school to get attention on his case. Mr. Yebes was not exonerated until 2020. There is no proof of such exoneration or record of the reasoning, save for the few media articles who reported the event. The last jurisprudential proof is the one cited at the top of this section that details the reasons for the Supreme Court's rejection of the appeal. M^eLevy argued that while Mr. Yebes was acquitted, no reasons were provided on the record, therefore, neither the public nor the profession had the chance to learn about why he was acquitted.

At the heart of this discussion is the call for published decisions of cases involving wrongful convictions. Clear reasons are not only important for lawyers, academics, and researchers but have a significant social and psychological impact on the wrongfully convicted person and their supporters, who are able to print and circulate proof of their innocence. Even without assigning blame, hearing an apology and recognition of harm from the bench and the prosecutor identifies that the system failed the person and helps with closure after their immense suffering.

Decarceration

Wrongful convictions provide us with material to highlight how dignity refers to a harm produced as a result of a person's vulnerability towards another person or power structure. Decarceration provides a discussion on methods to "restore" dignity or lighten vulnerability.

Emma Halpern, the Executive Director & Manager of Legal Services at the Elizabeth Fry Society (EFS) of Mainland Nova Scotia, explained that decarceration generally refers to reducing the number of people in prison or confinement but can also involve efforts to lessen or eliminate reliance upon carceral systems and the attitudes towards criminal justice that promote incarceration. Director Halpern states that relative to the rates of Indigenous incarceration in Canada, the "very concept of dignity and incarceration are a contradiction in terms." Halpern pointed to the seminal report of Justice Arbour from the mid-1990's in which she said that prisons are a place where "[t]he Rule of Law is absent, although rules are everywhere."⁸⁰ Halpern explained that more and more vulnerable people are being incarcerated, and Indigenous women are the population who have been failed the most. These women come from

⁷⁹ *R v Yebes*, [1987] 2 SCR 168, 17 BCLR (2d) 1.

⁸⁰ Justice Behind the Walls, "The Arbour Recommendations – Developing a Culture of Rights", online: <www.justicebehindthewalls.net/book.asp?cid=144>.

incredible hardship, trauma, and mental illness; things that privileged communities have never thought or heard of.

Jennifer Metcalfe, lawyer and the Executive Director of Prisoners' Legal Services-West Coast Prison Justice Society which focuses on liberty issues under s. 7 of the *Charter*, provided a harrowing examples of prisoner mistreatment, notably, that of Joey Toussaint, an Indigenous man of the Dene nation and his experiences in solitary confinement. Metcalfe described the many practices and realities that prisoners are subject to that often make them beyond the help of a lawyer whom they would be legally entitled to.

The panellists explained that these indignities are microcosms of larger, longstanding, and well-known issues regarding Indigenous over-incarceration and treatment by the law. In May 2022, it was reported by the Correctional Investigator that 50% of women held in federal prison identified as Indigenous.⁸¹ Indigenous people make up only 5% of the population in Canada; however, over 30% of the population in federal custody are Indigenous. The rate of incarceration of Indigenous people in Canada is 9.2 times higher than the rate of incarceration of non-Indigenous people. Over-incarceration of Indigenous people was identified as a crisis by the Supreme Court in 1999, when the rates were lower than they are today.

The panellists offered examples where dignity was lost, with very definite examples of what restoring or upholding dignity means, such as humane treatment when incarcerated, including more oversight in prison and accountability for those who work in prison and mistreat those serving sentences. However, most strongly stressed are less reliance upon carceral practices, more robust use of *Gladue* requirements, funding for Indigenous-run healing services, such as healing lodges⁸² (the scheme of which is already set out in ss. 81 and 84 of the *Corrections and Conditional Release Act*), and the greater use of the ability of Indigenous persons to serve sentences in their communities.

Patricia Whyte explained that she “found” her dignity when she began spending time in her community, working with Indigenous Elders and helping previously incarcerated women reintegrate into their societies. These statements faintly echo the recent ruling by the SCC in *R v Bissonnette*.⁸³ In that case, the court finds that s. 745.1 of the *Criminal Code*, which permitted consecutive periods of parole ineligibility, was contrary to s. 12 of the *Charter*. In its s. 12 analysis, the Court holds that the provision is incompatible with human dignity as it denies “offenders any possibility of reintegration into society” which “presupposes definitively and

⁸¹ Patrick White, “‘Shocking and shameful’: For the first time, Indigenous women make up half the female population in Canada’s federal prisons”, *The Globe and Mail* (5 May 2022), online: www.theglobeandmail.com/canada/article-half-of-all-women-inmates-are-indigenous/

⁸² Patrick White, “Healing lodges help reduce Indigenous overincarceration. Why has Canada allowed them to wither?” *The Globe and Mail* (21 Oct 2022), online: www.theglobeandmail.com/canada/article-indigenous-healing-lodges/

⁸³ *Bissonnette*, *supra* note 36.

irreversibly that they lack the capacity to reform and re-enter society.”⁸⁴ The Court maintains that to ensure respect for human dignity, Parliament must leave a door open for rehabilitation.⁸⁵

The Multifaceted Experiences of Marginalization and Systemic Injustice

Introduction

Negative biases and stereotypes can have a considerable impact on an individual’s experience in the world. Systemic discrimination is a cultural phenomenon that is deeply rooted in such “historical and societal attitudes.”⁸⁶ In *Fraser v Canada*, the Supreme Court held that “[a]dverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground.”⁸⁷ During the conference, many panels examine how social stigma can create barriers that exclude minority groups from equal participation in Canadian society. The speakers on Panel Five considered the effect of systemic ableism on people with disabilities. Those on Panel Eight explained how ageism can influence society’s perception older adults; and Panel Seven reviewed how traditional norms are associated with privilege in the legal profession. The panellists demonstrated that ageist discrimination is not based on a specific age, just as ableist discrimination is not based on a specific diagnosis, and scholarly privilege is not based on a specific grade point average, rather such marginalization is based on biases, myths, and stereotypes of ability and potential.

The Panellists Discussed Dignity in the Context of Their Experiences With Discrimination

Ableism can be defined as “ideas, practices, institutions and social relations that presume able-bodiedness,” framing people who have “disabilities as marginalised...and largely invisible ‘others.’”⁸⁸ Disability advocates and scholars, Michael McNeely, Dr. Heidi Janz, and Dr. Nancy Hansen, communicated their concern for their continued existence in the face of societal and medical ableism. They explained how able-bodied privilege can manifest through interpersonal interactions or as internalized feelings of inferiority and shame, however, ableism is also systemically entrenched in Canadian culture through “patterns of discriminatory and exclusionary practices” in sectors that are fundamental to a dignified life, “such as education, employment, and housing.”⁸⁹ The panellists advocated for the “social model of disability,” which elevates

⁸⁴ *Ibid* at para 73.

⁸⁵ *Ibid* at paras 83, 85.

⁸⁶ *Fraser v Canada*, 2020 SCC 28 at para 167 (CanLII).

⁸⁷ *Ibid* at para 30.

⁸⁸ *Brief of the Council of Canadians with Disabilities to the Standing Committee on Justice and Human Rights regarding Bill C-7, An Act to amend the Criminal Code (Medical Assistance in Dying)* (31 October 2020) at 1 [*Bill C-7 Brief*]

⁸⁹ *Ibid* at 3.

independent factors outside of “functional limitations...created by prejudice, stigma, and stereotype” and works with disability organizations to address ableism through “legal reform.”⁹⁰

On a similar note, ageism is often associated with loss and decline and perpetuated by the societal pressures to avoid the process of aging and remain young.⁹¹ Lawyer Ann Soden, advocate Nora Spinks, and geriatrician Dr. Nathan Stall discussed the marginalization of older adults and the impact of ageism on their dignity. The panellists claimed that ageism is one of the most socially accepted and unchallenged forms of discrimination, and that healthcare for older adults is unequipped to handle the disabilities associated with aging. Ageist discrimination can operate on a conscious level as a form of abuse or violence, or on an unconscious level as a form of neglect or ignorance,⁹² resulting in assumptions of fragility, dependence, and powerlessness.⁹³ Infantilization can negatively affect the mental health of older adults, as their social presentation defines their worth.⁹⁴ Conversely, the panel framed older people as a gift to others, their families, their communities, and society at large, deserving of respect and dignity for however much longer they are alive.

In the legal profession, dated stereotypes affect not only clients, but also the profession itself. Speaking on the Student Panel, law students Dominga Robinson and Michelle Liu, and legal professional Chantalle Briggs considered how minority representation can enhance self-worth in the legal profession. The panellists highlighted that barriers of whiteness, maleness, and class can be demoralizing for minority law students and legal professionals, who often feel tokenized and used as a tool to meet equity, diversity, and inclusion quotas. Moreover, law students with disabilities experience barriers to equitable inclusion: “lack of accommodation and support; difficulty finding employment; being told that accommodations were considered to be too expensive; [and] disclosure of disability leading to adverse treatment.”⁹⁵ The panellists expressed a need for initiatives that challenge the status quo to address current identities present in the legal profession, from race, gender, personal, and cultural identities to past professional background and training.

⁹⁰ Tess Sheldon & Ravi Malhotra, “Not All in This Together: Disability Rights and COVID-19” in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 419 at 421.

⁹¹ Martin Lagacé, Linda Garcia & Louise Bélanger-Hardy, “COVID-19 at âgisme: crise annoncée dans les centres de soins de longue durée et réponse improvisée?” in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 329 at 332.

⁹² *Ibid* at 332–33.

⁹³ *Ibid* at 333.

⁹⁴ *Ibid* at 333.

⁹⁵ Ruby Dhand, “The COVID-19 Pandemic, Accommodations and Legal Education” (2020) 25:4 *Lex Electronica* 175 at 176.

The Panel Discussion on Systemic Discrimination

Choice Can be an Illusion for Marginalized Populations

A rights-based framework regards all persons as having “an equal right to determine their own future and choose their own course of action.”⁹⁶ However, for some individuals, this choice may be constrained by factors outside of their control. In *Fraser v Canada*, the Court held that individual choice does not protect against a finding of discrimination, as “choices are themselves shaped by systemic inequality.”⁹⁷ Broad societal discrimination is not directly evident, but rather operates within “institutions which may seem neutral at first glance.”⁹⁸ When differential treatment forces behaviour modification to avoid discrimination, “such a choice violates human dignity.”⁹⁹

Many Canadians take for granted the ability to make decisions for their future; however, ableism can impact whether people with disabilities can make independent choices free from outside pressures. Rather than listening to what they want and need, The panelists illustrated that people with disabilities are chronically told how they should live their lives. Many disability advocates are particularly concerned about Medical Assistance in Dying (MAiD) and whether “ableist oppression” will coerce those who are unable to access fundamental support services to surrender their lives.¹⁰⁰ Without accessible housing, support services, and liveable wages, Dr. Janz believes that Canadians with disabilities will be driven to seek MAiD, as internal ableism may cause healthcare providers to automatically view a disability as their patient’s greatest source of suffering. She also emphasizes that healthcare professionals are generally more pessimistic about their patient’s prognosis than the person with the disability.¹⁰¹ Bill C-7 has further amplified the MAiD controversy, as advocates believe that “the removal of ‘reasonably foreseeable’ natural death as a limiting eligibility criterion” creates a “lethal form of ableism” that frames “suicide...[as] a ‘rational’ choice” due to the presence of a disability.¹⁰² Ableism can limit the options available to people with disabilities by pressuring them to make choices based on “pre-existing impairments, high support needs, quality of life assessments or medical bias[es].”¹⁰³

Age is likewise misunderstood in the medical context, as the conditions that would allow adults to age in place or die how they want do not currently exist.¹⁰⁴ Older adults are often “presumed to lack abilities that they in fact possess”¹⁰⁵ and spoken to through a family member instead of being

⁹⁶ Gerard Quinn, “COVID-19 and Disability: A War of Two Paradigms” in Morten Kjaerum, Martha F Davis & Amanda Lyons, eds, *COVID-19 and Human Rights* (London: Routledge, 2021) 116 at 119.

⁹⁷ *Fraser v Canada*, *supra* note 87 at para 90.

⁹⁸ *Ibid* at para 90.

⁹⁹ *Ibid* at para 87, citing *Lavoie v Canada*, 2002 SCR 23 at para 5 (CanLII).

¹⁰⁰ *Bill C-7 Brief*, *supra* note 89 at 5–6.

¹⁰¹ *Ibid* at 8 (Recommendation #8: “ensure that all discussions surrounding MAiD are patient-led and not prematurely initiated by the physician”).

¹⁰² *Ibid* at 5, 8.

¹⁰³ Quinn, *supra* note 97 at 125.

¹⁰⁴ See Ontario Human Rights Commission, *Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: Ontario Human Rights Commission, 2001) (“older persons might have little or no choice as to where they will live if they do not have the financial means or family support to remain in their own community” at 49) [ONHRC].

¹⁰⁵ *Gosselin v Quebec (AG)*, 2002 SCC 84 at para 32 (CanLII).

addressed directly.¹⁰⁶ The panellists speaking on ageism explained that as older people age, they are infantilized and shuffled into long-term care because their families do not have the know-how or the resources to care for them. The dignity of older people is intimately tied to feelings of value and empowerment, and mistreatment may engender “feelings of uselessness and devalued self-worth.”¹⁰⁷ Dr. Stall believes that forcing older adults into unwanted decisions perpetuates systemic ageism and strips older adults of their dignity and autonomy. He noted that only 15% of Canadians die at home, even though 85% would if they had the choice. Moreover, the interests of older people are not adequately represented in cases involving “prominent end of life decisions and human rights.”¹⁰⁸ Ann Soden explained that courts generally perceive an older person’s incapacity as a medical or a social problem, neglecting the inherent legal and human rights implications. Choice can be affected by structural and societal barriers related to age that force older adults into environments that do not align with their needs or desires.

Comparably, law students and legal professionals are held to a high standard that dictates the choices they should and should not make during and post law school. Speaking to the issues faced by law students and young lawyers, the Panellists explained that the legal profession imposes a set of accepted norms, which induces people early in their career to accept tasks that fall well outside their job description to “pay their dues” and demonstrate their resilience. Law students and legal professionals are encouraged to accept the “existing social, political, and economic arrangements” rather than critique the inherent barriers and seek to improve the existing order.¹⁰⁹ The Panel highlights that law students are expected to build a network and develop their career all while maintaining a competitive grade point average. As a result, many first-generation students find the profession to be “elitist or hypocritical on issues of access to justice,” and often alter their career objectives to manage their accumulated debt.¹¹⁰ Moreover, traditional standards can force marginalized law students and legal professionals “to make decisions about whether to adjust their appearance to conform.”¹¹¹ The panellists indicated that a student who is non-binary or trans may struggle to decide whether to comply with the expected gendered dress code of the court, just as an Indigenous student may wish to challenge institutional norms by wearing a ribbon skirt.¹¹² However, in general, choice that is constrained by the conventional expectations of the judiciary and other professional assumptions pressure law students and legal professionals to choose the less favourable option that is most likely to further their success.

¹⁰⁶ ONHRC, *supra* note 105 at 63.

¹⁰⁷ *Ibid* at 13.

¹⁰⁸ Charmaine Spencer & Ann Soden, “A Softly Greying Nation: Law Ageing and Policy in Canada” (2007) 2 J Intl Aging L & Policy 1 at 4.

¹⁰⁹ Brea Lowenberger, Michaela Keet & Janelle Anderson, “Collaborative Policy-Making, Law Students, and Access to Justice: The Rewards of Destabilizing Institutional Patterns” (2017) 34:1 Windsor YB Access Just 148 at 148–49.

¹¹⁰ Law Students’ Society of Ontario, “Just of Bust? Results of the 2018 Survey of Ontario Law Students’ Tuition, Debt, & Student Financial Aid Experiences” (January 2019) at 12–13 [LSSO] at 5.

¹¹¹ Kim Brooks, “The Daily Work of Fitting in as a Marginalized Lawyer” (2019) 45:1 Queen’s LJ 157 at 166.

¹¹² *Ibid* at 166. (“These standards mean that marginalized lawyers are regularly confronted with the need to make decisions about whether to adjust their appearance to conform” at 166).

Taken together, the panellists demonstrated the existence of systemic discrimination and how the actions of governments and institutions can have an unintentionally harmful effect on historically marginalized communities. While the Supreme Court has held discrimination to be arbitrary at its core because individuals are excluded based on attributed, not actual, abilities,¹¹³ the impact of differential treatment may vary depending on the circumstances,¹¹⁴ and when choices are restricted, individuals are restricted from living a fully dignified life.

Systemic Discrimination Can Perpetuate Society's Discomfort with Difference

Difference is defined as “a quality or state of being dissimilar...[or] distinct in nature, form, or quality.”¹¹⁵ As a concept, “difference” does not have any obvious, negative connotations; however, socially, “difference” can result in various forms of systemic discrimination. In *Fraser*, the Court finds “a significant risk that discrimination embedded in apparently neutral institutional policies, rules, or procedures will not be recognized as discriminatory,”¹¹⁶ and that such discrimination should be evaluated in reference to the “systems, structures, and their impact on disadvantaged groups.”¹¹⁷ The panellists highlight the discomfort present for individuals who diverge from the norm, and how this aversion perpetuates systemic discrimination.

Discomfort with difference can have an exceptional effect on the structural and social accommodations available to people with disabilities, as “the poor accessibility of public and private built environments ... [isolate and prevent] many people with disabilities from accessing the services they need.”¹¹⁸ In *Ontario (AG) v G*, the Court found that people with disabilities face “coercion, marginalization, and social exclusion,” which is perpetuated by “stigma, discrimination, and imputations of difference and inferiority,” and held that s. 15 is intended to ensure that people with disabilities are “treated as worthy and afforded dignity in their plurality.”¹¹⁹ Discussing ableism, the panellists explained that arbitrary bodily privilege defines how particular ways of “being, doing, and moving” are considered superior based on arbitrary mechanisms. In Canada, “buildings are built to exclude people who do not walk or see,” “students with disabilities are taught that it’s better to look, move, and behave as much like their nondisabled peers as possible,” and “terms associated with disability are used as insults” in ordinary everyday language.¹²⁰ In *Granovsky*, the Court explained that “[e]xclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself.”¹²¹ The need for consideration is reiterated in *Meiorin*, where the

¹¹³ *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l’Hôpital général de Montréal*, 2007 SCC 4 at para 48 (CanLII).

¹¹⁴ *Ontario (AG) v G*, *supra* note at para 61.

¹¹⁵ Merriam-Webster, “difference” (24 Jan 2023), online: <www.merriam-webster.com/dictionary/difference>.

¹¹⁶ *Fraser v Canada*, *supra* note 87 at para 29.

¹¹⁷ *Ibid* at para 31.

¹¹⁸ Canada, Department of Justice, The Saint John Human Development Council, *Serious Problems Experiences by People with Disabilities Living in Atlantic Canada* (Ottawa: Minister of Justice and Attorney General of Canada, 2021) at 5 [*Disabilities in Atlantic Canada*].

¹¹⁹ *Ontario (AG) v G*, 2020 SCC 38 at para 61 (CanLII).

¹²⁰ *Bill C-7 Brief*, *supra* note 89 at 1–2.

¹²¹ *Granovsky v Canada*, 2000 SCC 28 at para 30 (CanLII).

Court held that justice systems “should be sensitive to the various ways in which individual capabilities may be accommodated.”¹²² The panel discussion suggests that ableism is best addressed by those most affected through increased “representation and advocacy services” “within existing disability organizations.”¹²³ Dr. Hansen stated that the present level of disadvantage is not natural for people with disabilities, but rather, is based on the systemic ableism that is deeply entrenched in every sector of our society.

The panellists detailed that similar to ableism, ageism can include “prejudicial attitudes, discriminatory acts, and institutional policies and practices that lead to harm, disadvantage, and injustice.”¹²⁴ As older adults struggle to access appropriate health and community services, government funding prioritizes younger people in the workforce who are “contributing to society.”¹²⁵ For example, in Ontario, Bill 7 permits patients who are at an alternate level of care in acute care institutions to either be forced into LTC homes far away from their home community or face highly punitive fines.¹²⁶ Moreover, older people often hide any experiences of abuse and neglect that differentiate them from the norm due to the impact of social stigma and shame on their dignity.¹²⁷ Nora Spinks stressed that individuals who experience a loss in one area, such as mobility, cognition, or bladder control, are unable to conceal their difference, and their identity often becomes tied to that loss. She further explained that as people pass the age of 60, they are no longer considered capable adults but instead, are assumed to be “senior” or “elderly.” However, the panellists also noted that these terms carry heavy assumptions of being needy, noncompliant, and burdensome, while perpetuating the negative stigmas and stereotypes associated with age. Nora Spinks stressed that one day, all of our bodies will begin to betray us as well, and when we require assistance, we will expect to be afforded the same dignity and respect that we received in our younger years.

Moreover, the traditional justice system is not designed to adequately accommodate lawyers or students who present differently.¹²⁸ Law schools perpetuate the idea that legal professionals who are well-connected, and who fit “the mold of what a lawyer’s supposed to look and be like,” tend to have an easier road to success.¹²⁹ The speakers noted that law students are often told to omit any experiences that appear too intimidating or impressive and to conform to the image of their aspirational law firm. While mature students, who are comfortable with who they are, may be able to recognize the nuanced conventions embedded in the traditional legal system, Chantalle Briggs explained that students who graduate from law school at the age of 25—when the prefrontal

¹²² *British Columbia (Public Service Employees Relations Commission) v British Columbia Government and Service Employees’ Union (BCGSEU)*, [1999] 3 SCR 3 at para 64, 176 DLR (4th) 1 (CanLII).

¹²³ *Disabilities in Atlantic Canada*, *supra* note ? at 38.

¹²⁴ Sandra P Hirst & Kathy Majowski, “Elder Abuse: A Global Challenge and Canada’s Response” (2022) 48:4 J Gerontological Nursing 21 at 23.

¹²⁵ ONHRC, *supra* note 105 at 61.

¹²⁶ Bill 7, *An Act to amend the Fixing Long-Term Care Act, 2021 with respect to patients requiring an alternate level of care and other matters and to make a consequential amendment to the Health Care Consent Act, 1996*, 1st Sess, 43rd Parl, Ontario, 2022 (assented to 31 August 2022), SO 2022, c 16.

¹²⁷ Gemma E Smyth, “Mediation in Cases of Elder Abuse and Mistreatment: The Case of University of Windsor Mediation Services” (2011) 30 Windsor Rev Legal Soc Issues 121 at 127.

¹²⁸ Brooks, *supra* note 113 at 188–89.

¹²⁹ *Ibid* at 174–75.

cortex has only finished developing—are more likely to align their morals and values to fit the model of a typical lawyer.

Discussing the experience of law students and young lawyers, the panellists also discussed the theme of resilience in the legal profession, where students and lawyers are praised for their strength to persist in the face of copious assigned readings and taxing on-campus interviews. Dominga Robinson indicates that Indigenous law students are taught the injurious legacy of colonialism without consideration for their particular emotional and psychological reactions. In *Trinity Western University*, the Court held that because teachers are “a medium for the transmission of values,” they need to understand the “pluralistic nature of society and the extent of diversity in Canada” to “respect and promote minority rights.”¹³⁰ Furthermore, Michelle Liu advocated for mentorship programs that are representative of the diverse realities and identities of students and professionals to help those struggling to find their footing and to provide someone safe in whom they can confide. Mentorship can be an effective tool to provide minority groups with “the support necessary for [appropriate] career development.”¹³¹ Visible and invisible differences can define how an individual is perceived by their peers, and without clear representation in the legal profession, marginalized law students and legal professionals may feel pressured to downplay their difference to fit in.¹³²

The panellists demonstrated that, by acknowledging societal differences and incorporating more diverse perspectives, institutional policies, programs, and services can ensure marginalized individuals feel accommodated and empowered. Dr. Hansen stressed that we need to be more creative in how we value the way people move and experience the world and consider whom we are trying to make comfortable. Difference can strip an individual of their dignity and autonomy, therefore, Ann Soden states that we also have to dispel the notion that any individual is diminished through difference. To quote Dr. Hansen, “There is resistance in being present.”

The Pandemic Brought Systemic Weaknesses to Light

The COVID-19 pandemic had serious implications for many minority groups, revealing the “systemic factors that lead to marginalization and vulnerability.”¹³³ These factors included classism, ageism, ableism, racism, and colonialism.¹³⁴ Even though Human Rights Commissions advocated for a “human rights-based approach and independent oversight” to address the

¹³⁰ 2001 SCC 31 at para 13 (CanLII).

¹³¹ Deborah L Rhode & Lucy Buford Ricca, “Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel” (2015) 83:5 Fordham L Rev 2483 at 2504.

¹³² Brooks, *supra* note 113 at 164–67.

¹³³ Colleen M Flood et al, “Overview of COVID-19: Old and New Vulnerabilities” in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 1 at 19 [Flood, “Overview of COVID-19”]

¹³⁴ *Ibid.*

“existing inequalities” that would be exacerbated for minority groups,¹³⁵ decisions made during the pandemic failed to consider the potential barriers that would be created.

From the outset of this national public health emergency, people with disabilities were neglected and devalued worldwide.¹³⁶ The global COVID-19 Disability Rights Monitor revealed “systemic violations of fundamental freedoms and human rights of people with disabilities.”¹³⁷ Governments failed to consider the necessary accommodations in their emergency response protocols, websites informing the public of necessary safety measures were inaccessible to blind users, and sign language interpretation was not consistently incorporated into pandemic briefings by political leaders.¹³⁸ Michael McNeely indicated that barriers to accessing pandemic-related information impacted both the dignity and autonomy of people with disabilities because without clear information and guidance, they were denied their right to informed choice.

The onset of serious illness and rising deaths in congregate care facilities also negative implicated people with disabilities and older people who had complex needs and required specialized medical care.¹³⁹ Even though the UN Special Rapporteur on the rights of persons with disabilities reported in 2019 that segregated institutions should be abolished,¹⁴⁰ during the pandemic, “governments took no measures to protect the lives, health, and safety of persons with disabilities living in institutions.”¹⁴¹ Dr. Janz described “no visitor policies” in both institutions and hospitals, during which time, her disabled friends had “do not resuscitate” orders arbitrarily added to their charts without their knowledge and were asked by physicians whether they wanted interventions that were standard for non-disabled people, such as supplementary oxygen. Moreover, when she was in the emergency room, the doctor was unable to ascertain her medical history due to her speech impairment. While useful to stem transmission amongst vulnerable populations residing in institutions and hospitals, visitor restrictions can also “limit oversight, and expose vulnerable persons to additional abuse or neglect.”¹⁴²

Moreover, older people residing in congregate living facilities experienced particularly shocking conditions, as these institutions became the “epicentre of COVID-19 infections and deaths.”¹⁴³ Rising death tolls were “associated with overrun long-term care institutions,” where “personal support workers [were] forced to abandon their jobs for fear of the disease and for the health of

¹³⁵ The Manitoba Human Rights Commission, *A Human Rights Based Approach to the COVID-19 Pandemic: Principles and Actions* (Winnipeg: The Manitoba Human Rights Commission, 2020) at 3. See Ontario Human Rights Commission, *Policy Statement on a Human Rights-Based Approach to Managing the COVID-19 Pandemic* (Toronto: Ontario Human Rights Commission, 2020), online: <www.ohrc.on.ca/en/policy-statement-human-rights-based-approach-managing-covid-19-pandemic>.

¹³⁶ See Dr. Ciara Siobhan Brennan, *Disability Rights During the Pandemic: A Global Report on the Findings of the COVID-19 Disability Rights Monitor*, (COVID-19 Disability Rights Monitor, 2020) (“governments have yet to adopt truly inclusive responses to the pandemic” at 9).

¹³⁷ Brennan, *supra* note 138 at 22.

¹³⁸ Sheldon, *supra* note 91 at 423.

¹³⁹ Lagacé, *supra* note 93 at 334–35.

¹⁴⁰ See Special Rapporteur on the rights of persons with disabilities, *Report on the deprivation of liberty of persons with disabilities*, OHCHR, 40th Sess, UN Doc A/HRC/40/54 (2019).

¹⁴¹ Brennan, *supra* note 138 at 22.

¹⁴² Sheldon, *supra* note 91 at 428.

¹⁴³ Brennan, *supra* note 138 at 22–23.

their own families, sometimes leaving the frail elderly dehydrated, hungry, covered in feces, and in rare cases, left for dead.”¹⁴⁴ Dr. Stall reported that well over 90% of the people who died during the pandemic were over the age of 60, and often living in congregate care settings. He explains that the pandemic perpetuated systemic discrimination by characterizing old people as “a drain on scarce public resources.” He also added that the term “bed blockers” was used to blame them for the “shortage of emergency room beds”¹⁴⁵ and deflect attention away “from the vitally needed public debate about government priorities and funding for our healthcare system.”¹⁴⁶ In the face of this public health emergency, the government instituted precautionary measures to protect against the risk of infection, however, “the reflexive application of precautions to prevent one health risk can cause another [equally serious] health risk” for vulnerable populations.¹⁴⁷

The competitive law school environment exacerbated rigid restrictions present during the pandemic, as systemic discrimination was aggravated by the rapidly spreading virus.¹⁴⁸ Panel Seven explains that not all professors advocated for self-care; some encouraged students to take on more to prove their resilience, neglecting to consider the responsibilities that they may have outside of school. Chantalle Briggs indicated that this pressure further stratified inequities already present in law school, as students with more external responsibilities were disadvantaged. However, the panellists also acknowledge that the pandemic had a promising effect on work and educational environments for students and professionals with mental health challenges or other disabilities because the online environment provided greater accessibility and allowed them to attend specialist appointments without falling behind in class or at work. While the experience of the pandemic was not all negative for law students and legal professionals, those who needed accommodations still faced barriers that impacted their ability to succeed.

Policies and procedures implemented during the pandemic failed to consider many marginalized groups. Extended lockdowns and restrictive visitor policies isolated individuals already experiencing vulnerability, segregating them from the general population and devaluing their contribution to society.¹⁴⁹ Pandemic policies not only exposed systemic disadvantages, but also “exacerbated the vulnerability of marginalized groups and individuals.”¹⁵⁰

¹⁴⁴ Flood, “Overview of COVID-19,” *supra* note 135 at 8.

¹⁴⁵ ONHRC, *supra* note 105 at 61.

¹⁴⁶ *Ibid* at 61.

¹⁴⁷ Coleen M Flood, Bryan Thomas, and Kumanan Wilson, “Civil Liberties vs. Public Health” in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 249 at 254.

¹⁴⁸ Dhand, *supra* note at 178–79.

¹⁴⁹ Sheldon, *supra* note 91 at 424–25.

¹⁵⁰ Flood, “Overview of COVID-19,” *supra* note 135 at 19–20.

The Legal Basis for Considering Dignity in Discrimination Claims

The Supreme Court of Canada recognized the impact of differential treatment on a claimant's dignity in *Law v Canada*.¹⁵¹ While since *Kapp*,¹⁵² the test to establish discrimination no longer explicitly includes the concept of dignity, it remains significant throughout Canadian jurisprudence. Dignity in the context of discrimination was recently dissected in *Ward*,¹⁵³ The majority in that case found that "a reasonable person aware of the" comedic nature of the defendant's performance, would not be incited "to detest or vilify the humanity of the person targeted,"¹⁵⁴ therefore, the disabled claimant's "right to the safeguard" of his dignity, or to the protection of his worth, as a human being was not infringed.¹⁵⁵ The majority also "focuse[s] on the likely discriminatory effects of the expression, not on the emotional harm suffered by the person alleging discrimination."¹⁵⁶ Conversely, the minority opinion stresses the impact that the defendant's "freedom of expression" has had on a child with a disability, holding that "dignity of public figures is not necessarily subservient to the right to express harmful remarks."¹⁵⁷ According to the dissent, dignity is "the pre-eminent value of every human being recognized as a person in their own right, regardless of their individual characteristics and their social affiliations,"¹⁵⁸ and is "owed to individuals by virtue of their status as human beings," not defined by another's judgement.¹⁵⁹

Individuals feel dignified when they are "appreciated for life accomplishments;... respected for [their] continuing role and contributions to family, friends, [their] community and society;" and "treated as a worthy human being and a full member of society."¹⁶⁰ While the *Charter* allows discrimination where intended to ameliorate the "conditions of disadvantaged individuals or groups,"¹⁶¹ the Court has held that minority groups "are not treated with dignity just because the government claims that detrimental provisions are 'for their own good.'"¹⁶² To quote Justice Abella, "[t]he impact of behaviour is the essence of 'systemic discrimination,'" as "an arbitrarily negative impact...is more significant than whether the behaviour flows from insensitivity or intentional discrimination."¹⁶³ The panel discussions reveals dignity to be unconditional, inalienable, and foundational, not something that can be earned or bought, but rather, an inherent sense of pride in one's identity, which should not only be protected but also celebrated. By *Law*, dignity encompasses feelings of self-respect and self-worth based on "physical and psychological integrity and empowerment."¹⁶⁴ Such "dignity is harmed when" an individual feels "marginalized,

¹⁵¹ *Law v Canada*, *supra* note 37.

¹⁵² *Kapp*, *supra* note 5.

¹⁵³ *Ward*, *supra* note 1.

¹⁵⁴ *Ibid* at paras 108–109.

¹⁵⁵ *Ibid* at para 58.

¹⁵⁶ *Ibid* at para 86.

¹⁵⁷ *Ibid* at para 212.

¹⁵⁸ *Ibid* at para 167.

¹⁵⁹ *Ibid* at para 166.

¹⁶⁰ ONHRC, *supra* note 105 at 13.

¹⁶¹ *Canadian Charter of Rights and Freedoms*, s 15(2), Part I of the *Constitution Act, 1982*, being *Schedule B to the Canada Act 1982 (UK)*, 1982, c 11.

¹⁶² *Gosselin v Quebec (AG)*, *supra* note 106 at para 250.

¹⁶³ *McKinney v University of Guelph*, [1990] 3 SCR 229 at para 290, 76 DLR (4th) 545 (CanLII).

¹⁶⁴ *Law v Canada*, *supra* note 37 at para 53.

ignored, or devalued” and “enhanced when laws recognize the full place of all individuals and groups within Canadian society.”¹⁶⁵

Harms, Vulnerabilities and Systemic Injustices in Relation to Indigenous People

Strongly present in the Conference discussions was the disproportionate impact of these systems upon Indigenous people. We divided our discussion into theoretical, criminal, and civil contexts, therefore, the issue of systemic discrimination and vulnerability pertaining to Indigenous people relative to Canadian law and justice systems could not neatly be captured in any category. This is not to suggest that the other subjects are less important or complex. Rather, it is due to the many compounding factors that Indigenous peoples face by virtue of being Indigenous. Parsing the discussions into the above categories was not sufficient to provide an accurate picture of the situation. We take the time here to highlight the issues brought to light by the panellists.

Wrongful Convictions

In Canada’s history of inquiries into wrongful conviction, systemic prejudice against Indigenous peoples was explored in the inquiry into the Wrongful Conviction of Donald Marshall Jr., an Indigenous Mi’kmaq man who was 17 when he was arrested.¹⁶⁶ While many of the commission’s recommendations have been implemented, Senator Kim Pate points to the work and the report of the *Injustices and Miscarriages of Justice Experienced by 12 Indigenous Women A Case for Group Conviction Review and Exoneration by the Department of Justice via the Law Commission of Canada and/or the Miscarriages of Justice Commission*.¹⁶⁷ Senator Pate explained the intersection of race and women who, even after conviction, continue to take responsibility for the actions of their abusers and others. The report listed 10 systemic factors leading to miscarriages of justice for Indigenous women. These included “genocidal colonial forced removals from lands, institutionalization...where Indigenous peoples were subjected to violence and forced assimilation,” bias with respect to police response and persecutorial discretion, lack of alternative to punitive sentence, discriminatory risk assessment and practices, amongst others.¹⁶⁸

Many of these issues have been identified and recommendations are well known, such as those found in the *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*

¹⁶⁵ *Ibid* at para 53.

¹⁶⁶ Royal Commission on the Donald Marshall, Jr., Prosecution, *Digest of Findings and Recommendations* (Province of Nova Scotia, 1989) [Marshall Inquiry].

¹⁶⁷ *Law Commission of Canada & Miscarriages of Justice Commission, Injustices and Miscarriages of Justice Experienced by 12 Indigenous Women: A Case for Group Conviction Review and Exoneration* (Ottawa: Department of Justice, 2022).

¹⁶⁸ *Ibid* at 04–05.

(Arbour Report).¹⁶⁹ The panellists attested to the fact that the content of this report remains true to this day, indicating that very little has been done to address the discrepancies found in it. They found that more people are vulnerable in prisons and that the Indigenous women are overrepresented. Almost undeniably, people who are incarcerated suffer from mental illnesses. They come from situations that privileged individuals cannot comprehend. The panellists argued that to achieve dignity, we would need a responsible system, that allows for sentences to be served in the community. The following includes some notable and pertinent recommendations from the report:

- R2 (a)(b): the creation of a commissioner for the incarcerated women and that commissioner be well versed in women issues.
- R4i: teach women valuable jobs and trades in prison so they can work when they are released.
- R4L: create programs for families.
- R5: limit the interaction between male guards and incarcerated women.
- R6b: train the guards to intervene in a meaningful way, non violently, in times of crisis.
- R6g: perform body cavity searches on consenting individuals only.
- R7ai: provide access to healing lodges to all indigenous peoples.
- R9a: use segregation in accordance to the law only.
- R9d: end long term segregation.
- R9ei: impose a maximum of three days in segregation.

Sterilization Without Consent

Alisa Lombard, lawyer at Lombard Law and the lead counsel on a proposed class action based on the forced sterilization of Indigenous women in Saskatchewan and Manitoba, spoke on the issues associated with the forced sterilization of Indigenous women.

In 2016, a series of women reported that they had been sterilized without their consent. An external investigative report revealed systemic racism at a hospital in Saskatoon. The patterns of non-consensual sterilizations are long established, the first recorded being in 1973 and the last in 2002. They have impacted approximately 12,000 Indigenous women and have had a disproportionate impact on Black Canadians as well. Indeed, few policies or systemic changes were put in place to address the issue despite its fundamentality: the right to give birth.

Lombard explained that the ways in which these Indigenous women were coerced into sterilization are complex and multifaceted. Many Indigenous women reported being asked during labour whether they wanted their baby or indeed any other. Others spoke to more coercive measures taken against them. Lombard provides C-sections as an example where a physician will “tie the woman’s tubes” during the surgery without her consent. Lombard stressed that the women at issue have the capacity to make decisions; nevertheless, they are vulnerable in the face of the pressures put upon them. The basis for medical self-determination

¹⁶⁹ Government of Canada, “Commission of inquiry into certain events at the Prison for Women in Kingston/the Honourable Louise Arbour Commissioner” (3 April 2013), online: <publications.gc.ca/site/eng/9.831714/publication.html>.

is informed consent: an obligation to disclose all options, risks, benefits, and consequences no matter how large or minimal. Women in labour are in a place of acute vulnerability. Additional decisions regarding future births should be discussed well after the birth at hand concludes.

Beyond the issue of vitiation of consent, Lombard also explained that forced sterilization, when seen through what she describes as an “Indigenous perspective,” produces a special quality of harm. Forced sterilization is a modality of the erasure and displacement of Indigenous peoples, and therefore, threatens the ability for the Indigenous peoples and communities subject to them to regenerate, sustain, and grow their nations and family structures. Lombard stressed that in speaking of forced sterilization, we are not talking of dignity, but of indignities. Unwanted sterility goes to a woman’s core, affecting her sense of being a woman herself. This problem is intergenerational; mother and daughter are affected in some cases.

Lombard stated that the problem has risen to a level where courts need to start taking judicial notice, rather than blaming systemic racism or sexism. She outlined some of the routes that can be taken to revindicate their rights. Charges of sexual assault are an option, though on the state to pursue them. Indeed, Bill S-250 considered non-consensual sterilization in the same vein as female genital mutilation. Moreover, through tort law there are avenues, such as battery and negligence. There are also a series of expensive options for women who want to vindicate bodily autonomy and have their fertility restored, though these have only a 50–60% chance of restoration and are not easily obtained. Further, while private law remedies are usually compensatory, what can money do in the face of such a traumatic act?

Lombard concluded that s. 24 of the *Charter* appears to be the most promising avenue, as systemic problems require systemic solutions. Forced sterilization is a problem that disproportionately affects vulnerable populations during their most vulnerable time, and therefore, is a quintessential indignity.

Indigenous Children in Foster Care

Problems in Measuring the Number of Children

Amber Crowe, Executive Director of Dnaagdawenmag Binnoojiiyag Child and Family Services, Professor Barbara Fallon and Jennifer Cox, a Mi’kmaq lawyer working as the Senior Commission Counsel for the Mass Casualty Commission, discussed the issue of the overrepresentation of Indigenous children in foster care. They explained that the current model for child welfare and family justice is not working. Funding is required to implement something new. However, steps can be taken within the current model to promote the dignity of each member of the family unit. These include gathering more data on the outcomes of Indigenous children who have come into contact with child welfare agencies.

While the overrepresentation of Indigenous children in foster homes is a well-known problem, it is not a well-studied problem. One of the few sources of data is the 2016 census where households were asked whether or not they have a foster child in their care; however, despite

definitional issues,¹⁷⁰ this data shows that the rates of Indigenous children in care versus non-Indigenous are staggering (the average difference being eight-fold) with Alberta having the most differentiation (34-fold). She pointed to the 2019 findings from the *Denouncing the Continued Overrepresentation of First Nations Children in Canadian Child Welfare: Findings from the First Nations/Canadian Incidence Study of Reported Child Abuse and Neglect*.¹⁷¹ The study collected information from child welfare authorities across Canada, looking at who came through the threshold and how decisions were made in relation to children and families. Professor Fallon explained that First Nation children are 3.6 times more likely than non-Indigenous children to be investigated by a child welfare authority, and the decision to investigate is often based on the worker's subjective judgement such as, whether the child appears to be a victim of maltreatment or whether the family had been in Family Court. She further adds that Indigenous children are also 17.2 times more likely to be placed in formal out-of-home care. She explained that, as a national study has not been conducted since 2008, they had no basis for comparison; however, the out-of-home placement rates were lower in 2008. Many of these current cases are substantiated based on the worker's decision that the child has been subject to maltreatment, and Indigenous children are 23% more likely to be victims of substantiated neglect. Fallon added that colonialism and structural racism are represented in those numbers. The 2019 rates of Indigenous versus non-Indigenous children in foster care are staggeringly similar to those in 2016 and actually increase when considering the rate of placement in formal out-of-home care. This demonstrates the failure of current monitoring methods, i.e., ones that measure compliance as a metric for the well-being of the child.

Professor Fallon explained that the current measurements highlight compliance, meaning, whether or not a single child has received aid from the government. Crowe explained compliance in the context of the results of a study conducted in Ontario, *Mashkiwenmi-daa Noojimowin: Let's Have Strong Minds for the Healing*. The study found that welfare services are concerned with compliance, meaning whether the case-worker knocked on the door within 12 hours. However, outcomes are not monitored, which is much more important in determining whether the services provided were effective. Crowe explained that 17% of their investigation involved families on reserve in Ontario, where First Nation families were 2.9 times more likely than non-First Nation families to answer the door for CAS. She further explains that older children are more likely to be the subject of an investigation, and after Ontario raised the age of protection in 2018, older children were 2.7 times more likely to be the subject of a CAS investigation. She said that overrepresentation has not significantly changed since the 1990s despite contextual changes:

- (1) Federal legislation;
- (2) TRC;

¹⁷⁰ As the 2016 census data excludes some caring arrangements, such as an aunt caring for her niece.

¹⁷¹ The study used five categories of maltreatment to discuss proportionality, disparity, and overrepresentation: (1) physical abuse; (2) sexual abuse; (3) neglect; (4) emotional maltreatment; and (5) exposure to intimate partner violence. However, Fallon acknowledges that these categories are terrible categories for identity. Further, Métis and Inuit children were excluded from the study.

- (3) *Indian Residential Schools Settlement*;
- (4) MMIWG;
- (5) The focus on equity, inclusion, and diversity; and
- (6) Measures to address socioeconomic conditions.

Moving Toward Better Measurements

Crowe and Fallon argued that a much better metric to develop more responsive and efficacious child welfare agencies is measuring group outcomes. The first of the TRC's Calls to Action provide a framework for such a method:

Reduce the number of Aboriginal children in care by:

- Monitoring and assessing neglect investigations;
- Providing resources for Indigenous communities and child welfare organizations to keep Aboriginal families together and children in culturally appropriate environments;
- Ensuring proper education and training about the history and impacts of residential schools for those conducting child welfare investigations;
- Ensuring proper education and training on Indigenous-oriented solutions to family healing for those conducting child-welfare investigations; and
- Requiring all child welfare decision-makers consider the impact of the residential schools on children and their caregivers.¹⁷²

The first five of the 94 Calls to Action of the Truth and Reconciliation Commission of Canada focus on Indigenous children in care.¹⁷³ These involve publishing annual reports on the number of Indigenous children in care,¹⁷⁴ implementing Jordan's principle, and introducing child-welfare legislation establishing national standard for Indigenous child apprehension and custody cases.¹⁷⁵ While important legislation, such as the *An Act respecting First Nations, Inuit and Métis children, youth and families*, has been implemented, the monitoring requirements set out in the first Call to Action have not.

Fallon stated that it is very hard to determine whether the event of maltreatment is their worst parenting moment or just a Tuesday morning, and to intervene, you need to know the difference. She explained that child-rearing interactions are complicated because child-rearing is difficult. We need to make sure people understand parenting challenges on a continuum. She suggested that parents lack experience in child-rearing and development and need support; severity is hard to understand in the context of a particular family. The four nested domains of child welfare developed in 1996 are:

¹⁷² Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 1 (Call to Action 1).

¹⁷³ *Ibid* (Calls to Action 1–5).

¹⁷⁴ *Ibid* (Call to Action 2 includes comparisons with non-Indigenous children, including reasons for apprehension, the total spending on preventive and care services, and the effectiveness of interventions).

¹⁷⁵ *Ibid* (Call to Action 4).

- (1) A child's immediate need for protection;
- (2) A child's long-term requirement for a nurturing and stable home;
- (3) A family's potential for growth; and
- (4) A community's capacity to meet a child's needs.

Fallon explained that they are looking into what they can get from administrative information systems across Canada to populate these domains, stating that such systems are an underutilized resource. Crowe concluded the discussion by stating that more is being done to address how this information should be measured. For example, they are looking at ways of measuring outcomes in well-being as opposed to compliance; while compliance is not bad, when measured in isolation, compliance is not as meaningful as it needs to be.

Dignity and Protection in Stronger Relationships

Jennifer Cox addressed the significant work being done in relation to child welfare in Canada, particularly in Nova Scotia. Dynamics and services to ameliorate child welfare concerns differ depending on the province or territory. From Cox's experience, outcomes are better where relationships are more dignified through collaboration (between counsel, judges, social workers): communication is better when you know or understand one another. Cox explains that on-reserve communities in Nova Scotia tend to be a better environment because they have more culturally-appropriate and financial supports; whereas off-reserve services are more common in places like Saskatchewan. Cox explained that the Family Group Conferencing model (Wikimanej Kikmanaq Family Group Circle Program) created by Kristin Basque that takes things out of the courtroom and looks at placement in the community. Cox has observed that this model creates a power dynamic for the family, levelling the playing field by providing support in an environment where they are most comfortable. She explains that such planning is informal: they talk about the needs of the family and focus on supports and services. She added that this avoids people coming to court and feeling undignified when listening to what the agency lawyer is saying about them.

She noted the she observed really positive changes with respect to collaborative work, especially from Jordan's Principle funding. Cox highlighted that Jordan's Principle funding has been used for a variety of services and programs that were previously unavailable, such as:

- Respite services for families who had challenging children; and
- For parents struggling with addiction, they brought workers into the home, so the children never had to leave the home or the community (the parents left).

Legislative changes in Nova Scotia have also made a difference. They are now able to do (funded) customary placements in the homes. Cox explained that before this funding, they had a number of children in care because they did not have the financial dollars in place to support the family. This money has also affected the process of children leaving the care of the agency, who can now offer the supports and services that young people need when going out on their own (the same as a teenager going off to university). Cox believes that when the agencies and lawyers can better understand the communities, they tend to be more likely to defer to each

other and look to each other for guidance. Cox explained that she was appointed *amicus curiae* in a case to act as an advocate, resource, or a trusted face. She could speak to parents more frankly because she was from the community and had developed that relationship. She points to ways to introduce dignity into this process:

- (1) Collaboration outside of the litigation model;
- (2) Encouraging relationship building; and
- (3) Looking for opportunities within Indigenous communities for culturally-appropriate service delivery.

Cox stressed the importance of taking the conversation out of the litigation model and having a conversation about what services are needed to create a more dignified process where parents embrace what needs to change.

Practical Insights

1. Reform the relevant Criminal Code articles and federal policy governing miscarriages of justice to lower legal and practical threshold for a ministerial review and provide more transparency of ministerial decisions.
2. Shift focus from monitoring compliance to outcomes of child placement, prioritise community placement and provide greater funding to implement more responsive child welfare services to reduce the number of Indigenous children in foster care as well as protect them when in placements.
3. Provide greater oversight in correctional institutions to protect incarcerated people.
4. Move away from carceral practices and towards providing community-based services, housing and a living wage to keep people out of prison.
5. Improve accessibility of assisted reproductive services.
6. Increase the inclusion of people with disabilities in decision-making on legislation and policy that could, or have been shown to have, a disproportionate effect upon their health and well-being.

7. Reduce reliance upon carceral practices provide funding for more robust use of Gladue requirements as well as for Indigenous-run healing services, such as healing lodges and the greater use of the ability of Indigenous persons to serve sentences in their communities.
8. Ensure accommodations are available for students with disabilities.
9. Increase the number of inclusive mentorship programs for law students accounting for disability, gender identity, and marginalized communities.
10. Increase funding for home care support for older adults as well as funding for preventive and comprehensive chronic disease management, increase monitoring systems of care facilities and foster age-friendly communities that invest in maintaining social connectivity.

Conclusion

From three days of discussion we have put forward an interpretation of dignity that arose from the discussions had at conference: while dignity may struggle to find a determinate meaning, invoking it makes us aware of the risk of a serious harm that can befall an individual as a result of their vulnerability towards a state actor, law or policy through the means of systemic discrimination.

We highlighted the role of the state in our discussion because it was highlighted at the conference. Indeed, as the *Charter* only applies to state actors, and dignity, as a value, is a lodestar underpinning the rights therein, a focus on the state is appropriate. As we mentioned above, Weinrib understands dignity very much in the context of the relationship between ruler and the ruled. However, the Quebec *Charter of Human Rights and Freedoms*, which provides a right to the “safeguard of dignity,” applies between individuals as well as the state. This right captures prejudice suffered by vulnerable groups, as animated by widely held social biases, outside of those biases animating the operations of the state’s systems or actors. Indeed, our understanding of dignity, as involving harm, vulnerability, and systemic discrimination, by no means suggests that the state alone can infringe one’s dignity.