Hello all: welcome to the dignity podcast. My name is Roxana Jahani Aval, I am a 2nd year law student at the University of Windsor. This podcast will be dedicated to the topic of human dignity and will be guided on the criteria set out by Professor Reem Bahdi, as the supervisor of my research and the professor for the Human Dignity course at Windsor Law.

To provide a little bit of context; in addition to being a law student at Windsor Law, I am also the Chairperson of the Council of Canadians with Disabilities, a National cross-disability not-for-profit organization that works closely to create an inclusive and accessible Canada.

I would like to take a moment to acknowledge the homeland of the Indigenous People of this place we now call Canada. I am located in the Greater Toronto Area, but would like to honour Indigenous peoples from coast-to-coast-to-coast and honour the many territorial keepers of the land on which we work towards an inclusive and accessible Canada.

I would also like to take a moment to honor the advocates and colleagues that fought for and continue to fight for the rights of people with disabilities and the right to access end-of-life measures. These individuals include members from the CCD executive, council, and the end-of-life committee. I would also like to pay my respects to the advocates that have passed away during their fight for an accessible Canada, including, Carmela Hutchinson, Alexander Peeler, Ing Wong-Ward, Sandra Carpenter, and their families; Rest in Power and thank you for all you have done for this movement.

CCD does have an end-of-life ethics committee that works specifically towards palliative care information and cases, Medical Aid in Dying legislation (which is referred to as MAiD), and the barriers that people with disabilities face when attempting to access end-of-life care. This was the starting point and point of interest in which my research began. Accompanied by the Human Dignity course at Windsor Law, I was excited to explore how the two topics of end-of-life ethics and dignity interconnect.

Well, we have a very interesting topic to explore today. We will be looking at whether the courts should consider the concept of dignity in their decisions regarding end-of-life ethics?

The short answer is yes. Dignity should be considered while also addressing how the government and judiciary must address the subjective and contextual nature of dignity, how systematic discrimination and oppression impact end-of-life ethics, and the importance of the judiciary in producing remedies to the systematic downfalls that currently exist in end-of-life interventions.

Producing a roadmap for this research is vital in ensuring the question is discussed with multiple perspectives in mind. This roadmap includes three sections; first, we will be exploring whether dignity exists in the Canadian constitution, what the working definition of dignity entails, and how we explore dignity in an academic and legal context. Second, we will be looking at the current landscape of dignity in the judiciary, namely in jurisprudence, the impact of systematic discrimination and oppression on dying with dignity, well as the current legislation and short-comings of end-of-life ethics. Lastly, we will be exploring how the judiciary should address the impact of systemic discrimination and oppression, as well as indignity, on an individual's ability to access end-of-life ethics. Throughout this entire podcast, at every step, we will be exploring

and establishing whether the courts should consider the concept of dignity in their decisions regarding end-of-life ethics. We will notice a considerable amount of overlap and interconnection between the concept of dignity and the practice of dying with dignity.

Moving into the first part of our roadmap:
In Canadian legislation, we seldom saw the concept of dignity implicitly or explicitly mentioned, until very recently. Specifically, in the Canadian constitution, both from 1867 and 1982, the concept, or word "dignity", does not appear explicitly. Some believe that s. 15 of the *Charter of Rights and Freedoms*, which entails the rights regarding equality, speak to the concept of dignity implicitly, specifically using dignity as a direction of equality.[1] It has been recognized that over the years, dignity has become rooted in the constitutions of various countries across the world and has changed the substance of the law through such an implementation.[2] These explicit mentions of dignity are included in the constitutions of South Africa, Germany, Hungary, Israel, and Article 3 of the European Convention on Human Rights speaks to the prohibition of "inhuman and degrading treatment".[3,4] To compare, there is no mention of human dignity in the American constitution.[5] Legal scholar Erin Daly goes so far as to state that "it cannot be denied that the Supreme Court (of the United States) has so far declined to embrace human dignity with the ardor of its global peers", which can be similarly stated for Canada as well.[6] On the other hand, we see the United National Declaration on Human Rights explicitly mention that "all human beings are born free and equal in dignity and rights" under Article 1.[7] It is then reinforced with Article 2 of the Convention which states that "Everyone is entitled to all the rights and freedoms set forth in this Declaration".[8] But it must be mentioned that this particular article does not explicitly state that people with disabilities are entitled to the freedoms under the declaration or that specific article, but other intersects are mentioned as being entitled to the protections. In fact, this article does not mention gender either. Does this mean that dignity is not included for people with disabilities or individuals on the basis of gender despite it stating, "everyone is entitled to all the rights and freedoms"?[9] Without the explicit mention of disability, are people with disabilities protected?

In identifying the current climate of dignity, we see a mix of perspectives at play to answer some of the questions that I will pose throughout this podcast. Some scholars look at dignity in the lens of reproductive technology, genetics, end-of-life ethics, and whether dignity exists for individuals before life or after death.[10] Similar scholars would state that dignity is too

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[1] Rory O'Connell, "The Role of Dignity in Equality Law: Lessons from Canada and South Africa" (March 21, 2008) International Journal of Constitutional Law 6:2 at 267-286 online: Oxford Academic < https://doi.org/10.1093/icon/mon004>.
[2] Hartlee Zucker, "Dignity Rights: Courts, Constitutions, and the Worth of the Human Person, by Erin Daly" (2013) Osgoode Hall Law Journal 2013 online: West Law <https://nextcanada.westlaw.com/Document/I788a8c3866f611e38578f7ccc38dcbee/View/FullText.html?originationContext=docHeader&contextData=(sc.Search)&transitionType=Document&needToInjectTerms=False&docSource=9442eeeff341477683e436abaf87a135>.
[3] *Supra* note 1.
[4] Judgements of the European Court of Human Rights, "Strasbourg Court's Judgments: Prohibition of torture and inhuman or degrading treatment" (June 2010) 60th anniversary of the European Convention on Human Rights online: European Court <www.rm.coe.int/168071e4e2>.
[5] National Archives, "The Constitution: What does it say?" (October 12, 2016) America's Founding Documents online: Archives <www.archives.gov/founding-docs/constitution/what-does-it-say>.
[6] Erin Daly, *Dignity Rights: Courts, Constitutions, and the Worth of Human Person* (University of Pennsylvania Press, 2020) at 96 < https://doi.org/10.2307/j.ctv16qjxz7>.
[7] United Nations General Assembly, "Universal Declaration of Human Rights" (1948) 302:2 UNGA article 1 at 1 online: United Nations <www.verklaringwarenatuur.org/Downloads_files/Universal%20Declaration%20of%20Human%20Rights.pdf>.
[8] *Ibid* at article 2.
[9] *Ibid*.
[10] *Supra* note 1.

individualistic, despite it speaking directly to private or individual autonomy.[11] Specifically, it may speak too closely to free choice through autonomy and condemn the social protection measures that are seen as failing to respect dignity since they limit free choice.[12] Some scholars believe that respect is the basis of human dignity.[13] This includes treating others with respect, being treated with respect, assuring others are given respect despite having disability, dependence or limiting capabilities. There is an understanding that a person is owed dignity through an intrinsic point of view, meaning that the fundamental value and moral worth of a human is based on the fact that they are of "natural kind", and deserve absolute equal, inalienable dignity.[14] In other words, a person has the right to dignity just be being alive as member of a natural kind.

But it begs the question, what does this mean of dying? What does this mean of dignity claims in end-of-life ethics that are not resolved upon a claimant's death? If a person is given dignity just by being alive, does that mean that upon death, they are no longer a member of natural kind and therefore no longer deserve dignity? Does it mean that a person possesses dignity in life, and upon dying or exercising their right to die with dignity, their action removes their sense of dignity?

These are rather philosophical, but it presents many questions that need to be addressed. Specifically, if a person has dignity while alive but not upon death, does that mean that they no longer have dignity throughout the judiciary when presenting a constitutional court challenge and passing away in the middle of it, leaving their family to uphold and fight for their dignity after they have passed away? Do they still possess dignity after death? It is important to also mention that scholars like Erin Daly understand that "the right to dignity is coming to describe what it means to be human in the modern world".[15] That as humans, we demand and deserve dignity in deciding what happens to us through personal autonomy. At the same time, dignity can be employed as "a stand-in for all rights", as stated by Erin Daly.[16] Can our claim of personal autonomy be done through others? Can these claims be substantiated post-mortem? Given these perceptions of dignity from a fundamental human perspective, should the judiciary consider dignity in cases of end-of-life ethics? Possibly. When dignity is the fundamental concept involved in dying with dignity claims, why would a decision involving a constitutional challenge on the basis of dying not include an analysis of a person's dignity and the implications to whether they are able to practice autonomy in that decision? Logically, the judiciary should have to incorporate a dignity analysis in cases where the basis of the medical assistance in dying claim involves dignity when the claimant and their families express that the claimant experienced indignity in the end-of-life process.

In continuing to analyze the concept of dignity in both social and judicial spheres, we that the concept of dignity is often looked at through two lenses as derived from Roger Brownsword as influenced by philosopher Immanuel Kant. Scholar R. James Fyfe notes that despite the lack of recognition for dignity in the *Charter*, the courts have provided an implicit mention of dignity in

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[11] *Ibid*.
[12] *Ibid*.
[13] John Vorhaus, *Giving Voice to Profound Disability: Dignity, dependence and human capabilities* (Routledge, 2015).
[14] Daniel P. Sulmasy, "Dignity, Disability, Difference, and Rights (August 28th, 2009) Philosophical Reflections on Disability at 183-198 online: Springer Link <link.springer.com/chapter/10.1007/978-90-481-2477-0_11>.
[15] *Supra* note 2.
[16] *Ibid*.

their judicial decisions at the Supreme Court of Canada.[17] Fyfe states that previously, the courts have erred in their definition of dignity. He states that this err is derived from the courts linking dignity with human interest, essentially stating that human dignity predicts human quality, that dignity is an inherent value that "humans have (or should be viewed as having)".[18] Instead, he states, the courts should be looking at dignity through two lenses. The first lens is described as "Dignity-as-liberty", where dignity is being understood as a function of human autonomy, being tied to freedom and the ability to make various decisions that allow humans to freely live their lives, as derived from Immanuel Kant's philosophy.[19] The second lens is described as "Dignity-as-constraint", where a communities ideas of civilized life is the concentration of dignity, this includes what is valued by humans as a whole, including situations of consenting to indignity.[20] With Dignity-as-constraint, it is stipulated in Brownsword's ideology that a person should not be able to consent to indignity as it contradicts the ideas of civilized life; examples Fyfe introduces includes consenting to prostitution, commercial surrogacy, gene patenting, etc.[21]

In analyzing dignity-as-liberty and dignity-as-constraint, we must recognize which is most commonly used by the judiciary, either implicitly or explicitly to get an overarching understanding of how the current and historical climate of dignity works within the judiciary. Historically, we have seen dignity-as-constraint play a huge role in judicial decisions. Specifically, upholding pro-life in abortion settings until the landmark case of *R v. Morgentaler*, as well as the prohibition of protection and being able to sustain a livelihood from prostitution until *R v. Bedford*[22]. These two under Brownswords understanding and ideologies of dignity-as-constraint would be considered as civilized wrongs and they would be considered as consenting to indignity. Since Dignity-as-constraint is introducing and upholding this ideology of community ideas in a "civilized life"; it is being upheld over the ability to choose how one lives through a dignity-as-liberty lens.[23] In many ways, we have seen, and are currently seeing, the judiciary moving away from a historic or traditional dignity-as-constraint lens that was derived from the origins of common law, from religious origins, and are recognizing that dignity-as-constraint has shifted in the last 50 years to a modern, transformed ideology.

This modern and transformed ideology is seen in decision like *R v. Morgentaler* and *R v. Bedford* and other even in relation to the ability to conduct gene patenting or commercial surrogacy that may come up in the future. That a dignity-as-constraint no longer speaks solely to religious origins or common law origins that are dated and no longer work in our evolved world.

The Court in *Law v. Canada (Minister of employment and immigration*), which we will refer to as *Law v. Canada*, also points out another misconception that has been used in the courts when applying dignity. The court suggests implicitly that individuals should be looked at as situated beings, identifying that they are not abstract entities.[24] That the court is dealing explicitly with

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[17] R. James Fyfe, "Dignity as Theory: Competing Concepts of Human Dignity at the Supreme Court of Canada" (2007) Sask L. Rev. 70:1 online: West Law <www.heinonline.org/HOL/LandingPage?handle=hein.journals/sasklr70&div=5&id=&page=>.
[18] *Ibid* at page 2.
[19] *Ibid*.
[20] *Ibid*.
[21] *Ibid* at page 3.
[22] *R v. Bedford*, 2013 SCC 72.
[23] *Supra* note 17 at page 2.
[24] Reem Bahdi, *Dignity Taxonomy*, PowerPoint (Faculty of Law, University of Windsor, November 18th, 2020) at slide 3 online: Blackboard <https://blackboard.uwindsor.ca/bbcswebdav/pid-324646-dt-announcement-rid-19619704_1/courses/LAWG5830-1-R-2020F/The%20Dignity%20Course_Week%2010_Episodes%2014%20and%2015_Dignity%20Taxonomy.pptx>.

people's lives and with society (or groups of people), instead of a legal idea or concept to juggle.[25] As such, the court should see dignity in an interpersonal way that encompasses the dignity-as-liberty principles of autonomy, self-worth, and the right to choose, while also being cognisant of social or group values, but not linking identity or worth based on group or social categorization. In other words, the court should not be linking personal autonomy or choices of the person the current status of that topic in society or a group, instead it should be looked at through the individual claimant and based on the individual claimant's dignity-as-liberty, self-worth, and respect, as well as the right to choose.

Denise Reaume states in her article "Indignities: Making a Place for Dignity in Modern Legal Thought", that "judges often focus on the extreme or flagrant nature of the Defendant's conduct in a way that suggests that this was a particularly bad way to behave, as though it tells us that the moral quality of the act was such that it ought to attract legal disapproval".[26] Reaume shows that the dignity-as-constraint perspective still exists. That the judiciary still looks to pin a "morally wrong" perspective on a person's actions based on societies values, when in reality, the court should be recognizing the cluster concept of dignity, that individuals are inherently complex and their choices are also complex and subjective, including their choice to die with dignity. But in other ways, we also see the shift mentioned earlier; that dignity is no longer seen as a religious argument in Canadian courts. As a way of upholding dignity as a community while frowning on individual displays of indignity, in other ways, we also see the shift mentioned earlier, that dignity is no longer seen as a religious argument in Canadian courts. Now, the courts are finally analyzing a person's ability to choose, and that societies views on taboo topics are shifting to a progressive, "you choose for yourself" mentality. Frankly, it's refreshing to see this shift through court challenges, pushing the status quo in society, and seeing the judiciary moving away from the old mindset of "community values first", shunning suicide and assisted suicide. In allowing individuals to choose how they conduct their personal autonomy, the dignity-as-liberty perspective becomes more abundant and implicit in judicial decisions involving end-of-life measures, despite dignity not being explicitly stated in many Canadian statues or the Canadian constitutions.

In many ways, we must also thank the shift in the judiciary's analysis of dignity through a basic constitutional concept known as the "living-tree doctrine". The doctrine originated in *Edwards v. Canada*, also known as the Persons Case, where Lord Sankey stated that the constitution is "a living tree capable of growth and expansion within its natural limits", a document that is "a continuous process of evolution".[27,28] Some scholars hold the perspective that the living-tree doctrine, in its current state, allows for "large and liberal" meanings and interpretations to occur.[29] However, in using the living-tree doctrine, we are able to move into using the constitution to alter the way the judiciary decides their cases, based on a shift in societal values, to impact individual claimants lives from a dignity-as-constraint lens to a dignity-as-liberty lens.

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[25] *Ibid*.
[26] Denise G. Réaume, "Indignities: Making a Place for Dignity in Modern Legal Thought" (2002) Queen's L.J. 28:61 at para 78 online: West Law <www.nextcanada.westlaw.com/Document/Ibd210711434e11db876784559e94f880/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)&firstPage=true>.
[27] Justice Robert Sharpe & Justice Peter Oliver, "The Canadian Doctrine of the Living Tree", (May 19, 2015) Law and Public Affairs online: University of Oxford <www.law.ox.ac.uk/content/canadian-doctrine-living-tree>.
[28] *Edwards v. Canada (AG)*, [1930] A.C. 124, 1929 UKPC 86 at page 106.
[29] Asher Honickman, "Has the Supreme Court Moved Beyond the 'Living-Tree'?" (March 30, 2018) Advocated for the Rule of Law online: Rule of Law <www.ruleoflaw.ca/has-the-supreme-court-moved-beyond-the-living-tree/>.

However, this shift into personal autonomy and subjective lived experiences of claimants cannot be done through the living-tree doctrine alone. Dignity as Epistemology plays a crucial role in the shift from community values and historic interpretations of constitutional rights to the current climate of dignity-as-liberty.

Scholar Jennifer Nedelsky explains the way in which dignity can be implemented into judicial decisions.[30] Nedelsky explains how to analyze judicial judgements in a receptive manner, through accessing insights, values, perspectives, autonomy, security, dignity, and many other sources as the basis of the receptiveness of judicial judgement. When understanding judgements through receptiveness, an invitation to openness and new possibilities in solutions are presented to tackle and address on-going social issues that the court must turn their attention too. This is done through accessing the living-tree doctrine in identifying socially driven change that is being introduced as a court challenge, but also by introducing concepts such as dignity through interveners and perspective pieces for the court to analyze in their decision making. For example, these perspectives can be added through intervener factums from stakeholders who represent and understand the topic closely, such as groups that represent people with disabilities providing insight and analysis on cases involving palliative care measures, or MAiD legislation. In fact, CCD was an intervener in *Carter v. Canada*, which aided the courts in understanding the impact that the lack of Medical Aid in Dying legislation had claimants, this was done through describing the lived experiences of people with disabilities.

Dignity as Epistemology looks to incorporate individualistic perspectives of claimants into judgements through receptive practices by judges. But this also includes stakeholders and other who can speak to the experiences and to the downfalls of the specific provision or piece of legislation. Dignity as Epistemology allow judges to look at social and personal values that are introduced to the courts when trying specific cases, one of these values being dignity.[31] How receptive judges are depend on the evidence that is being brought forward to provide the contextual perspectives of claimants and knowledge brought to the court by either side (and their interveners) on specific topics. When judges are receptive to considering dignity in their analysis and final decision, then personal autonomy will be considered as a vital piece of the puzzle by the judiciary through precedent, whilst also reflecting that society may be looking for the same change that an individual claimant is arguing in their case. In other words, if judges are reading factums and claims that are stating that dignity is a key factor in their analysis around dying with dignity, then receptiveness and judgement will likely incorporate dignity in the analysis for accessing end-of-life measures through those individualistic perspectives by the claimant and others that the court will then consider.

To break it down further, seeing as the concept of dignity is not explicitly stated in many statues or the constitution, there are three ways to incorporate dignity in an implicit way into judicial decisions; first, through dignity as epistemology in judgment and receptiveness, while differentiating justified belief from opinion; second, through the living-tree doctrine, and third, through judicial interpretation. These three concepts should work in unison to bring dignity into the legal doctrine and decision-making process. When incorporating the concepts of judgment

[30] Jennifer Nedelsky, "Receptivity and Judgment" (December 20, 2011) online: T and F <www.tandfonline.com/doi/full/10.3402/egp.v4i4.15116?scroll=top&needAccess=true>.
[31] *Ibid*.

and receptivity along with the living-tree doctrine in unison, we establish an open and transformative collection of future legal decisions through judicial interpretation (as social change and the climate of society will also advance and demand individual cases of indignity are going to be more readily considered). Judicial change in itself requires judges to be receptive and open to the claimants individualistic and subjective experiences, values, and general social demands for change.[32]

In concluding this first part of our roadmap, it's important to highlight the key topics that were discussed as a way to understand the interconnection between dignity and the judiciaries role in end-of-life ethics decisions. Specifically, the impact of dignity-as-liberty in understanding personal autonomy, self-worth, realization, and the right for an individual to choose how they conduct their private affairs. Additionally, the understanding of dignity-as-constraint where social values were in history the norm in which the judiciary would decide cases. But now is shifting to more individualistic dignity-as-liberty perspectives. Additionally, understanding the impact of receptivity and judgement through dignity as epistemology and the interconnection to the living-tree doctrine, as well as judicial interpretation to create precedent in the future. That would incorporate the voices of individual claimants, interveners, stakeholders, and the communities at large that are disproportionately affected by end-of-life measures.

Moving into the 2nd part of our roadmap, it is important to understand how the dignity is currently being used in the judiciary within Canada.

Now, these concepts are simply ideologies until we understand how the concept of dignity is currently being addressed and enforced in the adversarial system. Currently, dignity is being defined as worth[33], individual entitlement, self-realization[34], security of the person[35], autonomy (at times, autonomy is being looked at as too individualistic in dignity-as-constraint analyses)[36], but these are to name a few. But there are still some fundamental differences in identifying dignity as either a subjective or societal standard.

We established through R. James Fyfe that the court's may have had an inaccurate definition of dignity in the past. This was done by linking human dignity to human quality.[37] Identifying human dignity as human quality sparks the conversation that dignity is subjective and identifying dignity as human quality would be dependent on what a person's quality of life looks like, and their threshold of being able to handle indignity. To be clear, identifying dignity as subjective to the claimant is not an issue, if anything its accurate. But, in linking dignity to an individual's personal quality of life is a difficult and subjective analysis that the courts may not be able to address accurately. A broad stoke test will be discussed further later on.

We have established until now a brief outline of the definition of dignity, but now we are going to provide some professional perspectives, we look to commentary by Yvonne Peters. Yvonne Peters is a lawyer and human rights advocate and has been a sole practitioner out of

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[32] *Ibid*.
[33] *Supra* note 14.
[34] *Supra* note 2.
[35] *Carter v. Canada*, 2015 SCC 5 at para 68.
[36] *Supra* note 1.
[37] *Supra* note 17.

Saskatchewan for 25 years.[38] Yvonne has been blind from birth and overcame many accessibility challenges both in law school and legal practice.[39] She was a founding member of the Women's Legal Education and Action Fund, served as president for the Saskatchewan Voice of the Handicapped, is currently a co-chair for the International Committee at the Council of Canadians with Disabilities; Yvonne was appointed by the Federal Government to the Court Challenges Program of Canada Expert Panel on Human Rights.[40,41] Yvonne had some interesting and insightful comments about the subjectivity of dignity during my interview with her, most notably she stated "there are different ways of understanding of dignity, but we all understand dignity as treating people with respect, that all humans are worthy, and entitled to decency. That's our common societal understanding. But when you start looking at dignity as a component of the law or a legal factor, then it's hard to define the scope of it. When you start thinking of it, you find that dignity is subjective…I can't imagine them doing anything other than being subjective on it, but also the subjectivity of the claimant, as everyone, perhaps, has a different level of understanding of what is dignity. It's contextual".[42]

I began digging a little more into precedent where dignity is an apparent influence. Yvonne pointed out that dignity is subjective to the claimant and contextual to the claimant's circumstance, and I believe she is right about that.

In looking at cases such as *R v. Morgentaler*, *Carter v. Canada*, *Rodriquez v. British Columbia*, *Law v. Canada (Minister of Employment and Immigration)*, dignity is actually being looked at with a subjective, contextual analysis of dignity in both the context of the person and society by the courts. This precedent is impactful for claims involving dignity moving forward, especially with end-of-life ethics issues. Since dying with dignity is subjective on the personal claimants' beliefs, values, limits of dignity, as well as diagnosis, living conditions, financial means, medical and personal support, and many other factors.

In analyzing the current climate of dignity in the judiciary, we turn our attention to the landmark case of *R v. Morgentaler*. In *Morgentaler*, Justice Wilson speaks directly to the concept of dignity as a factor in judicial decisions, specifically in section 7 of the *Charter of Rights and Freedoms*[43], stating that dignity speaks to "a degree of personal autonomy over important decisions intimately affecting their private lives".[44] Although Justice Wilson was looking at abortion rights in this case, this is none-the-less speaking to a persons right to choose. Arguably, that's what dignity is about, the right to make conscious and willing decisions in the most intimate parts of a person's private life.[45] Justice Wilson provided a perspective about a person having the right to personal autonomy, and for legislation or common law to remove those rights goes against a person's right to life, liberty, and security of the person.[46] As Justice Wilson

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[38] CBA National/ABC National, "Making a Difference: Yvonne Peters" (January 23, 2014) Law In-depth online: CBA/ABC National <www.nationalmagazine.ca/en-ca/articles/law/in-depth/2014/making-a-difference-yvonne-peters?feed=rss>.
[39] *Ibid*.
[40] *Ibid*.
[41] Kaye Grant, "Yvonne Peters guest speaker for Empower U Webinar…" (February 13, 2020) Events, News online: Manitoba League of Persons with Disabilities <www.mlpd.mb.ca/yvonne-peters-guest-speaker-for-empower-u-webinar-on-wednesday-february-19-2020-from-1-00-pm-to-200-pm-est/>.
[42] Interview of Yvonne Peters (November 4th, 2020).
[43] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[44] *R v. Morgentaler*, [1988] 1 SCR 30, 37 CCC (3d) 449 at para 171.
[45] *Ibid* at para 173.
[46] *Supra* note 43 at s. 7.

states, “the idea of human dignity” stands as “the basic theory underlying the *Charter*”.[47] Right off the bat we see the impact of dignity in the cases such as Morgentaler that was arguably one of the first cases in Canadian jurisprudence that we can actually see dignity being explicitly stated; and were thankful for it. It paved the way for dignity to be mentioned over and over again in different contexts.

Now in transitioning the conversation of end-of-life ethics and the impact of dignity on claims of dying with dignity from the definition and current climate of dignity, it is important to look at the remarks in the landmark case of *Carter v. Canada*. *Carter* is the lead precedent in dying with dignity claims, as well as end-of-life intervention, and Medical Aid in Dying (also known as MAiD). Due to *Carter*, the right to life can be waived under s. 7 of the *Charter*.[48] In other words, to submit someone to suffering because of the law is depriving someone of the security and choice over the timing of their death, it is unconstitutional.[49] Interveners in *Carter* stated that the law is arbitrary and overbroad as it stipulates an absolute prohibition against assisted dying, which in turn treats all people with disabilities as vulnerable while protecting individuals who do not need or wish to have protection, and denies people with disabilities any capacity for autonomous decisions and self-determination.[50] This is an important fact to realize as well. The MAiD legislation and end-of-life intervention should be given to those who choose to access it. People who do not believe in or want to access the interventions do not have too, and those who wish to do so have the right and opportunity to die with dignity, it is a person’s choice nonetheless. In fact, this reinforces the perspective that subjectivity and contextual analysis of the claimants should be considered by the courts in end-of-life ethics discussions, as the right to choose does not mean a person is bound by the choice. Just as they choose to opt into end-of-life interventions, they can also choose to opt-out if they change their mind, and legislation exists due to *Carter* for this purpose. Judicial interpretation, dignity as epistemology, and the living-tree doctrine also contributed to this (as well as the precedent of *Morgentaler* in establishing dignity as autonomous choice in the judiciary, which is fundamental to this research question).

Additionally, *Rodriguez v. British Columbia* brings to light the unconstitutional criminal prohibition of end-of-life interventions on the basis of security of the person, while *Carter* and *Morgentaler* both incorporate dignity as a basis of s. 7 and security of the person. In *Rodriguez,* the court states that “personal autonomy, at least in respect to the right to make choices concerning one’s own body, control over one’s physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibition which interferes with these”.[51] This incorporates having adequate provisions in place to assure a qualified professional can provide end-of-life interventions. These measures prevent individuals with altered intentions in helping a person who wants to utilize end-of-life interventions to do so, while protecting the dignity of the patient, and assuring that the administration of justice does not fall into disrepute. This protection is done through MAiD legislation, but also through removing criminal prohibitions due to its unconstitutional nature of preventing and not allowing professional intervention in end-of-life measures.

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[47] *Ibid* at para 166.
[48] *Supra* note 35 at para 63.
[49] *Ibid* at para 25.
[50] The Alliance of People with Disabilities Who Are Supportive of Legal Assisted Dying Society, “Factum of the Intervener – *Carter v. Canada*” (August 29, 2014) Interveners to the Supreme Court of Canada online: SCC-CSC < www.scc-csc.ca/WebDocuments-DocumentsWeb/35591/FM130_Intervener_Alliance-of-People-with-Disabilities.pdf>.
[51] *Rodriguez v. British Columbia (Attorney General),* [1993] 3 SCR 519, 107 DLR (4th) 342 at para 21.

Rodriguez brings up another important piece of the puzzle. The courts remark that the basic respect for dignity and life are an intrinsic value. But, in incorporating end-of-life measures and the right to terminate one's life, would it take away from that intrinsic value on life? The court replied with a remarkable statement, "This question in turn evokes other queries of fundamental importance such as the degree to which our conception of the sanctity of life includes notions of quality of life as well".[52] In attempting to justify the criminal prohibition of end-of-life ethics, as upheld in *Rodriguez* and later amended in MAiD, we would also be assuring that people who are terminally ill are banned from choosing what sort of quality of life they want. In truly encompassing the living-tree doctrine and dignity as epistemology, a person should be able to choose when and how they die when they are told the remainder of their lives will likely be painful and filled with suffering, and that little intervention can be done to prevent it. When claimants are speaking their truth, it is up to the judiciary to listen. We will likely see more court challenges entering the judiciary on the basis that government, statutes, and the judiciary are attempting to govern what a person's quality of life will look like.

The court is *Rodriguez* states, "No new consensus has emerged in society opposing the right of the state to regulate the involvement of others in exercising power over individual ending their own lives", as historically the sanctity of life was seen as excluding the ability and choice to self-inflict death and allow others in aiding another to end one's life, no matter the circumstance.[53] The prohibition was upheld in *Rodriguez*, but the fight for end-of-life ethics continued as we see in 2015 when *Carter* was decided by the courts. We see the impact of dignity-as-constraint, but in actuality, dignity-as-liberty is rightfully the new norm for end-of-life ethics cases in Canada.

The court in *Law v. Canada* captured dignity as a cluster concept.[54,55] The cluster concept identifies dignity as a collection of meanings that show the complex nature of personal autonomy, self-respect, self-worth, physical and psychological integrity, empowerment, and the promotion of individual needs, capabilities, and merits.[56] We establish this briefly previously but emphasizing the cluster concept is extremely important in understanding how dignity is actually looked at in the judiciary today. In *Law v. Canada*, Justice Iacobucci made comments specifically to dignity within s. 15 of the *Charter;* S. 15 states that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination".[57,58] He recognized that s. 15 is vital to prevent the "violation of essential human dignity and freedom through the imposition of disadvantage … and to promote a society in which all persons enjoy equal recognition at law as human beings… equally capable and equally deserving of concern, respect, and consideration".[59] These include individual cases of patients requesting end-of-life interventions and those who are being denied those interventions, is poses the question, are they being discriminated against under s. 15? More specifically, if an individual who lives in rural Ontario, given that housing prices are more affordable or that they have roots in the community, has to suddenly access palliative care but

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[52] *Ibid* at para 14.
[53] *Ibid* at para 15.
[54] *Supra* note 24 at slide 3.
[55] Remy Debes, "Dignity: A History" (2017) Oxford University Press 408 online: NDPR <www.ndpr.nd.edu/news/dignity-a-history/>.
[56] *Supra* note 24 at slide 3.
[57] *Law v. Canada (Minister of Employment and Immigration*), [1999] 1 SCR 497, CanLII 675 at 51.
[58] *Supra* note 43 at s. 15.
[59] *Supra* note 57 at para 51.

such care does not extend to that jurisdiction, are they being discriminated against under s. 15? Arguably, yes. Every person is equally deserving of concern, respect and consideration, as Justice Iacobucci stated. This includes people with disabilities, individuals who live in rural areas due to poverty, cultural roots, and should not be discriminated against because of those circumstances. Therefore, people with disabilities should and do expect the courts to continue deciding based on these facts, that the purpose of s. 15 is to prevent the violation of essential human dignity and freedom through disadvantage, stereotyping and social prejudice.

However, it is important to mention that s. 15 does not encompass dignity in its doctrinal analysis.[60] Subsequent to the *Law v. Canada* decision, the court in *R v. Kapp* identified that several difficulties have arisen in *Law v. Canada*'s attempt to employ human dignity as a legal test.[61] The difficulties arise from comments similar to Yvonne Peter's analysis, that human dignity is subjective to the claimant's circumstances and perspectives.[62]

Kapp spoke to, and in some ways, overturned the legal test attempted in *Law v. Canada* due to the subjective nature of a claimant claim with dignity. The attempted s. 15 test points out that the judiciary does care and consider dignity when the context addresses it. The test from *Law* did bring the explicit dignity piece that my research question acknowledges, that the judiciary should consider dignity, and likely would bring dignity forth for s. 15 claims regarding end-of-life measures when they reach the court. Upon concluding my research, I realized that not only does the court consider dignity when the claimant mentions it, but since dignity is mandatory and fundamental for humans, judges should explicitly entail an analysis on the claimant's dignity within their decision, when it is explicitly claimed that dignity is important for that case. Creating a claim based on indignity means that the claimant would like the court to specifically address dignity in their decision, but without explicitly identifying dignity, it is my belief that the court does keep dignity in mind when deciding most constitutional cases, again unless they are explicitly stated in the claimants claim. This may be a broad claim, but it seems to be occurring. To what extent it is being considered without being mentioned, I'm not sure.

This responds directly to the question I posed earlier, that a legal test or analysis would capture a claimant's perspective and circumstances in too broad of a stroke to truly encompass what their idea of dignity may be. In *Kapp*, the court states that "human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants", specifically it would burden individuals to satisfy the requirements of a legal test of whether a claimant experienced indignity.[63] Therefore, the broad stroke test will not be satisfactory for all claimants' situations in a way that the contextual piece is just too subjective and too narrow to accurately apply a broad test that would apply to all claimants.

To be clear, end-of-life ethics does not speak to people with disabilities alone, it speaks to people with disabilities who are also indigenous, people with disabilities who are people of color, people with disabilities who are living in poverty or are homeless, people with disabilities who are unemployed, etc. As such, the judiciary should treat claimants with the respect and contextual

[60] *R v. Kapp*, 2008 SCC 4 at para 22.
[61] *Ibid* at para 21.
[62] *Supra* note 42.
[63] *Supra* note 60 at para 22.

perspectives they deserve. Systemic discrimination and systemic oppression are alive in Canada, and the court cannot silo end-of-life ethics into a person with disabilities issue alone. The court must consider the impact discrimination and oppression have on people with disabilities who are intersectional and experiences colonization, anti-Black racism, poverty, are subject to the housing crisis, are immigrants or refugees, and are people of the LGBTQ+ community when attempting to access end-of-life measures.

Law v. Canada indicated something very important to the discussion of dignity and the judiciary, and it allowed for me to think about the discriminatory legislation around end-of-life ethics, and the government's response to advocates speaking to the unresolved systematic issues that stem from legislation and feed into, and the continuous lack of recognition in the legal sphere despite players stating the importance of these issues being addressed - is that the people are speaking, and the legal system is not encompassing and protecting individual while providing respect in their decisions around individuals (which explains why Law attempted to create a test for human dignity, which was then overturned by *R v. Kapp* that speaks to systematic discrimination for the intersects of people with disabilities). The precedent is a good start, but the court is failing to tackle the overarching systematic shortfalls of the institutions that claimants are bringing cases against. In fact, there are a number of claims that are coming and claims that are making their way through the courts that would address the amendments to MAiD and systemic discrimination, but more on that later. These include federal and provincial governments, and end-of-life interventions that are supposedly available for all people. The judiciary responds to downfalls of the government, and the government is meant to correct the areas identified by the judiciary, therefore the response to indignity is largely in the hands of the judiciary. The court must provide a clear guideline to government when asking the government to correct their systematic and legislative downfalls that affect individual's dignity regarding end-of-life ethics. It is likely one of the only ways real and profound change will occur, when enforcement and accountability are present.

Denise Reaume has a beautiful way of describing the budding nature of dignity. She states, "dignity is peeking out of various corners of the legal system, sometimes explicitly, if timidly, heralded by the courts, sometimes lying beneath the surface of new developments awaiting discovery".[64] The courts have allowed for dignity to peek out of various corners. We see it in *R v. Morgentaler, Carter v. Canada, Rodriquez v. British Columbia, Law v. Canada, R v. Kapp,* while also noticing the implicit whispers of dignity in Medical Aid in Dying legislation, while sometimes missing the mark. The world is getting closer and closer to end-of-life ethics interventions being equal and open to all but are failing to understand how truly important the word dignity is for all claimants who face systemic discrimination and oppression within dignity in dying.

I think it's important to outline what end-of-life ethics and interventions entail. Specifically, it entails palliative care[65], Medical Aid in Dying legislation[66], as well as Bill C-14[67], and the actual

[64] *Supra* note 26 at para 63.
[65] Government of Canada, "What is palliative care?" (August 27, 2019) End-of-life care online: Government of Canada < www.canada.ca/en/health-canada/services/palliative-care.html>.
[66] Medical aid in dying legislation citation Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying), 1st Sess, 42nd Parl, 2016 (first reading 14 April 2016).*
[67] *An Act to amend the Criminal Code and to make related amendments to other Acts (Medical Assistance in Dying*), S.C. 2016, c. 3.

act of dying with dignity. Palliative care specifically involves a number of interventions, including treatments that are offered for pain management, symptom management, social and psychological aid, spiritual and emotional support, as well as caregiver support.[68] The Government of Canada specifically categorizes palliative care as improving ones quality of life, reducing/relieving physical and psychological symptoms, helping to achieve a peaceful and dignified death, supporting family members and others in the process of dying and afterwards.[69] The government of Canada does speak to a "dignified death" in their information of palliative care, but keeping in mind that palliative care is not necessarily the same as Medical Aid in Dying. Palliative care looks to relieve symptoms for those who choose not to access Medical Aid in Dying, and instead to use the pain and symptom management resources available to them.

As end-of-life ethics were more prominently discussed and tried in cases such as Carter and Rodriguez, the government began implementing legislation that would adhere to dying with dignity. This includes Bill C-52: An Act Respecting End-of-Life Care originated in Quebec, and allowed physicians to assist a patient in ending their own life through specific provisions.[70]

After Bill C-52 was drafted, *Carter v. Canada* was decided in early 2015 where the court provided the government one year to provide a law that would allow for assisted suicide by a medical practitioner for competent patients suffering from "grievous and irremediable medical conditions that cause enduring suffering that is intolerable to the individual in the circumstances of his or her condition".[71] The *Carter* case highlights how truly important the subjective and contextual factor is to the individual patient accessing MAiD legislation. Bill C-14 was introduced and brought with it specific guidelines to access medical aid in dying. These included; (1) be eligible for government-funded health services in a Canadian jurisdiction, (2) be at least 18, (3) have capacity to make health-related decisions, (4) have a grievous and irremediable medical condition, (5) make a voluntary request for medically-assisted suicide, and (6) give informed consent.[72] The regulatory statute for Medical Aid in Dying provides a comprehensive and authoritative stance on the procedure and practicality of dignity in dying. Prior to *Carter*, *Rodriguez*, Bill C-52 and Bill C-14, medical assistance in dying was a goal, an objective for people who suffer with incurable illnesses. But now, it provides hope and a remedy for some people to access, either palliative care, medical assistance in dying, or any other intervention, but ultimately, it's the right to choose. In the article "Assisted Suicide: Criminal Code or Regulatory Offence?". The authors provide an insightful phrase that really caught my attention, "While this is a difficult procedure to implement in both a practical and moral sense, dying with dignity is an important concept and relates to autonomy, beneficence, and justice, all important concepts in Canada's healthcare system".[73]

As we can see throughout this podcast, dignity and end-of-life ethics overlap heavily. Dying with dignity initiatives and legislation rely on each other to develop autonomous rights to choosing

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[68] *Supra* note 65.
[69] *Ibid*.
[70] John P. Allen, Bernard Aron, Mr. Justice Rick Libman, "Assisted Suicide: *Criminal Code* or Regulatory Offence (Part 3)" (May 2015) RegQuest online: West Law < https://nextcanada.westlaw.com/Document/I1a8373861a846d10e0540021280d79ee/View/FullText.html?originationContext=docHeader&contextData=(sc.Search)&transitionType=Document&needToInjectTerms=False&docSource=61357885680946b49f3e2bac153dcebe>.
[71] *Ibid* at para 127.
[72] *Supra* note 66 at cl 3 (s 241.2(1) of the *Criminal Code* as proposed by Bill C-14).
[73] *Supra* note 70.

death. We can even go as far as to say that dignity is the basis to end-of-life ethics. I have mentioned the concept of dignity in its definition, within the current climate of jurisprudence and legislation, how systemic discrimination impacts a claimant's dignity in dying, and how they explicitly and implicitly overlap within almost every sphere of a person's right to choose to die.

Moving into the final part of our roadmap, we will be exploring how the judiciary should address the impact indignity through systematic discrimination and oppression, and the impact it has on an individual's ability to access end-of-life ethics.

We must recognize and remark on situations where systemic discrimination and oppression are being overlooked in Canada, specifically within palliative care.

There are concerns that the government has not addressed current gaps and inconsistencies that exist within the availability of palliative care, causing individuals to believe MAiD is the only option available, but the two interventions differ exponentially.[74] To be clear, the concerns are also surrounding how the government deals with the systemic discrimination and inconsistencies in being able to access resources and support for individuals who live with disabilities or incurable illnesses, and in many ways do not wish to access MAiD or palliative care measures, but feel as if they have to deal with the lack of resources and lack of resources from the government; choosing to die instead.

As I mentioned earlier, as of now, the MAiD legislation does not mention palliative care explicitly, and does not produce solutions to the shortcomings of the palliative care issues the community has addressed.

In many ways, this is the role of the judiciary. The judiciary may face court challenges that speak to the unconstitutional nature of palliative care and being able to access such care. Some challenges may include s. 15 and s. 7 breaches, that individuals are not able to access such care due to the timing of their diagnosis, the speed of their decline in health, where they live ((specifically, the inability for Indigenous folxs living on reserves, homeless people, largely due to colonization and discrimination) rural communities, poverty filled communities, racialized communities that may be geographically distanced from areas that are able to access such care).

Additionally, challenges may come post-mortem, where individuals who either accessed or could not access palliative care recognized its short-comings and require the judiciary to address those issues before their death but died before able to challenge the provisions. Regardless, the conversation in the judiciary will often resort back to the "dignified death" factor the government mentioned in their descriptions of palliative care resources.[75] Without the dignity analysis, as subjective, contextual, or society driven it may be, is required to access whether initiatives are sufficient enough, and if not, how the judiciary may ask parliament to remedy those insufficiencies, and how the judiciary may set precedent, such as in *Carter*, that would endorse and support dying with dignity. I mean dying with dignity in a non-ethical and non-

[74] Rosanne Beuthin, Anne Bruce & Margaret Scaia, "Medical Assistance in dying (MAiD): Canadian Nurses' experiences" (July 4, 2018) Nursing Forum 53:4 online: Wiley <10.1111/nuf.12280>.
[75] *Supra* note 65.

discriminatory sort of way, with the ability to access resources and the ability to access care that would speak to all people with disabilities not just a select few.

Even now, we see a real-life example of how the governments lack of resources and adequate legislation towards mental health disabilities are affecting individuals with lifelong mental illness. The court did not explicitly exclude mental illness it's definition of "grievous and irremediable medical conditions" within *Carter*.[76] Individuals and groups began speaking out about the impact of any legislation related to dignity in dying to people with mental illness.[77] Some groups even advocated that mental illness was not relevant to *Carter*, and was not within the scope of *Carter*.[78,79]

A point must be mentioned around a patient's death being reasonably foreseeable[80,81]; The Center for Addiction and Mental Health included a public policy submission that speaks to the denial of MAiD for people who attempt to access MAiD for mental illness as their sole grievous and irremediable medical condition.[82] After MAiD legislation was passed, the government looked to initiate an independent review to understand requests where the sole underlying medical condition is that of mental illness.[83] In MAiD, "natural death" is seen as death that is likely to occur as a consequence of a progressive illness and does not refer to an individual's proximity to death (for example, from advanced or old age).[84] So It begs the question, should mental illness be covered by MAiD legislation? Should people with mental illness be able to access medical assisted suicide in situations where their mental illness is seen as permanent, likely to progress condition, causing psychological and physical suffering, even if it does not see a foreseeable 'natural death'? Is this an issue that the judiciary may find themselves deciding on in a s. 15 constitutional challenge, seeing as mental illness is classified as a disability (despite *Carter* being challenged on a s. 7 breach)?[85] Or would the judiciary decide that more adequate and appropriate resources must be made available to individuals who suffer from mental illness that is seen as detrimental and permanent to their health? And most importantly, how does dignity come into play here? If dignity is seen as a core concept in advocating for Medical Aid in Dying, how does it factor into situations where a person chooses to end their own suffering using the same means another person with an incurable disease, simply because its mental illness, may not see a foreseeable 'natural death', and is heavily stigmatized, why is there a gap? As much as I wish I had the answer, I do not. This topic will continue to be controversial and will be stigmatized until it is properly addressed by government and the judiciary. Frankly, I would have loved to continue the research done on mental illness around MAiD, but I could see an entire hour-long podcast being dedicated to just that specific issue and what the community stated about it, but for this purpose I wanted to provide a real-life example of the gap where MAiD is

[76] Centre for Addiction and Mental Health, "Policy Advice on Medical Assistance in Dying and Mental Illness" (October 2017) online: CAMH.ca <www.camh.ca/-/media/files/pdfs---public-policy-submissions/camh-position-on-mi-maid-oct2017-pdf.pdf>
[77] *Ibid* at page 1.
[78] Trudo Lemmens, Heesoo Kim & Elizabeth Kurz, "Why Canada's Medical Assistance in Dying Legislation Should be *C(h)arter* Compliant and What It May Help to Avoid" (2018) 11:1 McGill JL & Health S61 at s103.
[79] *Supra* note 35 at para 125.
[80] Jocelyn Downie & Jennifer A. Chandler, "Interpreting Canada's Medical Assistance in Dying Legislation (March 2018) IRPP Report at 1 online: IRPP <www.irpp.org/wp-content/uploads/2018/03/Interpreting-Canadas-Medical-Assistance-in-Dying-Legislation-MAiD.pdf>.
[81] *Supra* note 35.
[82] *Supra* note 76 at page 1.
[83] *Ibid*.
[84] *Supra* note 80 at page 33.
[85] *Supra* note 78 at page s64.

currently sitting at, and how the judiciary may be able to remedy that gap in real life cases that may occur.

Well Dr. Laverne Jacobs and I had an insightful and extremely important conversation regarding systemic discrimination, the lack of resources provided by the government, and their impact on end-of-life ethics. Dr. Laverne Jacobs is the Associate Dean of Research & Graduate Studies at the University of Windsor, Faculty of Law. She is the Director of the Law, Disability, and Social Change project, a research and public advocacy initiative housed at Windsor Law that works to foster and develop inclusive communities. Dr. Jacobs has served on the Board of Directors of the Income Security Advocacy Centre, the Canadian Institute for the Administration of Justice, where she has sat on its Research Committee and Administrative Tribunals Committee.[86] Dr. Jacobs and I discussed how people with disabilities in poverty are affected by MAiD legislation and the option to die with dignity. Dr. Jacobs stated "if we find people with disabilities who are asking for medical assistance in dying, we should be considering why they got to that stage"[87], specifically people with disabilities who are in poverty and may choose MAiD because of the lack of resources and care they are being given on a systemic level. Often, people with disabilities receive government assistance to assure they have money to live on. This money is not enough, this is well known.[88] At times, people with disabilities would rather exercise their option to die because of the lack of support and financial resources, than to continue living with suffering and the current state of affairs they are in. The same can be said of the lack of mental health resources which lead to people with mental illness to attempt to access MAiD.[89] This is an issue. This is a fundamental human rights issue that is so often overlooked, as people with disabilities are unfortunately, not on the top of the government's priorities. Even now, we face the reality that our issues are often pushed to the corner.

To provide an example - It was noted in British Columbia that the provincial government, in its attempts to aid deficits in the provinces current financial spending to date, are cutting taxes - which resulted in major decreases in spending for public health care.[90] The government is directly or indirectly taking resources to palliative care away through these cuts, while also removing social services and community aids to already underserved groups that consist of minorities, such as Indigenous, Black, racialized, and disabled folxs.[91] Not only do the tax cuts not provide anything for these communities, it takes away from what little resources were already allotted. When speaking to the universal health care system and saving money for the government, scholars such as Alex Schadenberg, would even go as far as to state, "The social pressure to save money will lead to a form of social responsibility. People will be socially pressured to die", I will let that sink in for a second. [92]

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[86] University of Windsor, "Biography – Laverne Jacobs PhD, Associate Professor, Associate Dean, Research & Graduate Studies" (2018) online: UWindsor <https://www.uwindsor.ca/law/ljacobs/>.
[87] Interview of Laverne Jacobs (November 20th, 2020).
[88] Alex Schadenberg, "Canada's Health Care Savings Attributed to Euthanasia" (November 2020) The EPC Newsletter No. 222 at 1online: EPCC <www.epcc.ca/wp-content/uploads/2020/10/EPC-Newsletter-222-Online.pdf>.
[89] *Supra* note 76 at page 1.
[90] Melissa Giesbrecht, "Intersectionality and the 'Place' of Palliative Care Policy in British Columbia, Canada" (January 2012) An Intersectionality-Based Policy Analysis Framework chapter 4 at 69-91 online: Research Gate <www.researchgate.net/publication/250305418_Intersectionality_and_the_%27place%27_of_palliative_care_policy_in_British_Columbia_Canada>.
[91] *Ibid*.
[92] *Supra* note 88.

Dr. Jacobs continues, "the problem with medical assistance in dying legislation and changes coming to the legislation…is that when we allow medical aid in dying and say you don't need to have a reasonably foreseeable death, we start to erode the respect that should be given to marginalized groups… we start to indicate or suggest that people with disabilities have lives that are less worthy of living".[93] Dr. Jacobs is referring to the recent legislative amendments that the government has proposed for MAiD legislation, particularly Bill C-7. This Bill allows for an amendment to be made around a person's natural death being reasonably foreseeable.[94] Meaning, they will be taking that specific section out, stating that a persons death does not need to be reasonably foreseeable in order to access MAiD. Essentially, the amendment allows an individual with permanent health issues who have pain and suffer to access MAiD, even if their death is not within a reasonably foreseeable time, and does not have a "natural death", which disproportionately affects people with disabilities. In making such an amendment, the government is allowing people with disabilities who may suffer, not due to their condition per say, but more to the lack of resources and support, to access MAiD even when their illness does reasonably foresee a natural death approaching. To add insult to injury, the amendment also states that there will not be a 90-day waiting period to access MAiD for people with terminal illness, and produces a 90-day waiting period for people who do not have terminal illness, but will likely be overturned by the judiciary, as it could present an inequality of the law; creating a dangerous precedent (that some individuals may be able to access MAiD and some may not).[95] If I may quote from Schadenberg again, "people will be socially pressured to die", and the government will be making amendments as a "safeguard" that is designed to be over ridden at the judiciary level.[96] In many ways, this is an optics point for government, that they aided the disability community and the judiciary was the one who overturned their aid, especially on the 90-days safeguard. In many ways, they are purposely creating an amendment that the community does not want, and did not ask for, and will allow the judiciary to take the fall on that, as they know its conflicting with law, and that the judiciary objective stance will be forced to alter it. In identifying that laws are overlapping or contradicting each other that an amendment or change in precedent must be made to address the conflict or overlap to address that specific topic. I must also mention that the new amendment would uphold the inability for a person with a mental illness as their single identifiable grievous or irremediable medical condition to still not be able to access MAiD measures. Again, this is a tricky subject and could take its own whole podcast but is still so important to mention how MAiD amendments are affecting people with disabilities disproportionately.

Instead of providing resources, support, and funding to people with disabilities to assure their quality of life improves despite having medical conditions that may cause pain and suffering to a reasonable degree, they allow people to choose death or living in poverty, homelessness, with trauma, with systemic discrimination.[97] Disability scholar Catharine Frazee speaks to Bill C-7 amendments to MAiD and the fact that COVID-19 brought the daily challenges of people with disabilities to light. Catharine believes the government should be providing support and necessities to people with medical conditions that are disabling in order to live full and

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[93] *Supra* note 87.
[94] Bill C-7, *An Act to Amend the Criminal Code (Medical Assistance in Dying)*, 1st Sess, 43rd Parl, 2020.
[95] *Supra* note 88.
[96] *Ibid*.
[97] Heidi Janz "Opinion: We must ensure revised assisted dying law will not threaten lives of people with disabilities", *Calgary Herald* (October 26, 2020) online: Calgary Herald <www.calgaryherald.com/opinion/columnists/opinion-we-must-ensure-revised-assisted-dying-law-will-not-threaten-lives-of-people-with-disabilities>.

meaningful lives.[98] She puts this haunting reality into words, "It's a cold comfort … to be offered the choice to die when you are not offered the choice to live a dignified life – when you are not offered the basic supports and the basic dignity that we as Canadians we'd consider… minimal for all members of our community".[99] Where is the balance struck between autonomy and an individual's security?[100]

I connected with Heather Walkus, about this as well. Heather is a Community Developer, Organizer and Advocate, with 5 decades of lived and living experience working in social justice and intersecting cross disability Human Rights in Canada and Internationally. She holds the position of the 1st Vice Chair of the Council of Canadians with Disabilities and has a background in Universal Design and organizational development. During our interview, Heather stated "This new legislation states you have an out... and its assisted suicide. It really lends itself to thinking about history and … ethnic cleansing, all of these things are connected to that same mindset, we have to get out of it".[101] Heather spoke extensively about how impactful these amendments are to harming people with disabilities, that people with disabilities are being ousted from society, and have been for years.

This is dangerous to the lives of people with disabilities. Dr. Jacobs stated in her interview, "I think that whenever we have that type of equality concern within a legal discussion about medical assistance in dying, we should be stopping to take into account the equality concerns and whether they appropriately addressed".[102] To which I reply, you are absolutely right Dr. Jacobs. Ultimately Dr. Jacobs says it best, she states that "I don't think we can give on the one hand, medical assistance in dying, and on the other hand, erode the equality of the disability community".[103] Medical assistance in dying and equality concerns must be addressed together, as the erosion on the rights of people with disabilities are resulting in more individuals with disabilities using MAiD measures to end the suffering that results from poverty and oppression rather than the pain and suffering of a medical condition.

The judiciary, without explicitly stating it, did not intend for MAiD and end-of-life ethics to be used in such a way. It is meant for people who choose freely, without the stress of feeling like there is no other way to address their fundamental financial and lack of resource issue to end their life out of desperation of their circumstances, rather than to do so from the suffering of their medical condition. Both instances speak to a person's dignity, however, as people with disabilities who are choosing to access MAiD because of the governments lack of consideration in dealing with the deficiency of resources for their fundamental issues is still jeopardizing their dignity.
There needs to be fundamental change.

In many ways, addressing this issue is and is not the role of the judiciary to deal with. The judiciary may deal with this when claimants enter the legal system to challenge provisions or

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[98] CBC Radio "'Cold comfort to be offered the choice to die' when not offered support to live, says disability advocate", *CBC News* (November 19, 2020) <https://www.cbc.ca/radio/thecurrent/the-current-for-nov-19-2020-1.5807944/cold-comfort-to-be-offered-the-choice-to-die-when-not-offered-support-to-live-says-disability-advocate-1.5808541>.
[99] *Ibid*.
[100] *Ibid*.
[101] Interview of Heather Walkus (November 25th, 2020).
[102] *Supra* note 87.
[103] *Ibid*.

practices. The judiciary is able to identify that a s. 15 breach has occurred in a claimant's situation or within a provision of a statute. Through identifying such a breach, the judiciary may direct the government to address the provision and provide an allotted time to make adequate revisions, especially when it speaks to a large section of legislation, or to develop legislation from scratch. Alternatively, the judiciary may overrule a provision of legislation or action of government and its parties. That is when the government must make a decision, whether they sustain the broken system in which people with disabilities in all forms are being unheard, under-resourced, and under-valued, or they provide more than adequate resources and funding to the situation at hand. That they change the system from within. The judiciary has a hand in this process, but not as substantial as the power to create or amend legislation, as well as allocate resources that the government has. Therefore, there are many ways for the judiciary and court to address the issue of end-of-life ethics, and in other ways, it's for the government to deal with.

Indignity in end-of-life ethics largely begins and ends in the system of oppression and discrimination that still exists in Canada. The judiciary should address the indignity in their decisions regarding end-of-life ethics, and in doing so must provide strict guidelines for the government to address and alter in the allotted timeline provided by the courts. Without this process, people with disabilities will continue to experience the instability that occurs when federal and provincial governments change every few years. In saying this, it would speak directly to legislation being addressed and then repealed, and through that cycle over and over again, the instability continued. Provincial and federal governments have a way of repealing legislation that the previous government brought in when they see that it does not align with their political values. But luckily, we have the courts that could actually take those pieces of legislation and amend them or state that a section of that provision is unconstitutional and goes against a person's fundamental rights. In many ways, the judiciaries role is a safeguard to the public, and in many ways, they are able to incorporate the concept of dignity. We can also see that the courts may bring in those pieces of dignity as epistemology, dignity-as-liberty into their decisions while the government, due to their political agendas, may not be able to do so or may not be willing to do so. To be honest, I wish there was a better conclusion to this section, but in reality, we will continue to see challenges coming to the courts on the basis of discrimination and oppression, and it's for the judiciary to decide what the remedy and policy changes need to be. The judiciary, in many ways, provides a sense of accountability for the government to deliver on creating an inclusive and accessible Canada, as long as they adequately and consistently address dignity in their decisions regarding end-of-life ethics. Both through the implicit mention from the claimants, interveners, stakeholders, and others. Also, from explicit mention by the courts themselves.

Well, we have reached the end of the third piece of our roadmap.

Conclusion:

I think it's important to state, I have continuously answered the initial question at hand, I will answer it again, connecting the concepts discussed with precedent, social implications, remedies available, and at the core of it all, Dignity.

Whether the courts should consider the concept of dignity in decisions regarding end-of-life ethics?

As I mentioned in the beginning of my podcast in my short answer; The answer is yes, with a caveat. The judiciary should consider dignity, but such a consideration within individual court challenges should be considered with a subjective and contextual lens for the claimants medical and living conditions. Meaning, when an individual brings a claim regarding their own constitutional rights being infringed due to the state or practitioners conduct around end-of-life measures and interventions, a subjective, dignity-as-liberty lens should be considered. This includes an analysis from interveners, stakeholders, and adequate expert testimony to establish dignity as epistemology, and an individual's perspective on their personal dignity. In cases where the judiciary is questioning the constitutional validity of a section of legislation or practice that is spearheaded by an individual claimant, class of claimants, or public interest standing, the discussion of dignity may bring a larger policy driven consideration of dignity for the greater good, and such a subjective and contextual analysis may not be explicitly required for such cases, but rather to speak to the culture of indignity as a whole. Instead, the judiciary should be cautious with their analysis of end-of-life ethics from a dignity-as-constraint perspective when deciding how such policy reform would affect an individual's personal autonomy while attempting to satisfy society's interest. If you didn't catch it, that's my caveat.

There is a distinct issue with the courts deciding to take a dignity-as-constraint lens in some ways, and an attempt to bring in the concept of dignity without truly understanding the contextual and subjective nature of a claimant's actual circumstances. To be clear, when I speak to contextual and subjective perspectives. I am not speaking to a judges perspective, but instead to the claimant, group of claimants, or individuals who are represented by a group who are with public interest standing and their contextual and subjective analyses and perspectives in specific circumstances. The caveat here states that in other words, there should be a shift from society to a broad individualistic perspective (when speaking to dignity-as-constraint), as the policy will ultimately affect select individuals whilst still functioning in society. But not only should the judiciary consider the concept of dignity in future decisions, but the judiciary has incorporated dignity in current decisions where the government or society questions personal autonomy and the right to choose.

We have explored the way in which the judiciary should consider dignity, through dignity as epistemology, the living-tree doctrine, judicial interpretation, applying other nations constitutions where dignity is explicitly mentioned, through dignity-as-liberty, through applying *Carter*, *Morgentaler*, *Law*, *Carter*, and *Rodriguez* as precedent, and through existing and amended MAiD legislation.

Then what is the next step? As long as the judiciary, particularly the Supreme Court of Canada, and the Court of Appeal of each province and territory, readily listens to stakeholders through intervener factums and affidavits, as long as they look at the consultations, inviting us to the table, allows for public-interest standing to persist, for individuals to hold standing, and their families to hold standing post-mortem, they will be listening to society, and they will be listening to individuals who are asserting their dignity in each case they bring forward or challenge. As long as the judiciary evolves with society, addresses systematic discrimination, as well as

addressing the fundamental discrepancies in legislation by government, they will be doing justice by the very society they serve. It is not a perfect system, it never ever will be, it was not made that way. Until we begin to address the systemic discrimination, oppression, ableism, that exists within legislation and within the rhetoric of the legal sphere, we won't be a just system either. But it is evolving into a more inclusive one, one day at a time, one case at a time, and one rights movement at a time.

In law, we have and will continue to see that claimants' experiences and perspectives may not be heard, addressed, or applied to decisions the judiciary makes. This is not uncommon. But, in applying perspectives and opinion into submissions given to various levels of the judiciary, the chances and opportunities to have claimants' voices heard are substantially increased. In identifying that there are persistent and dedicated claimants, groups, and stakeholders that advocate for their voices and experiences to be heard, then we have already begun the process of accessing and applying our dignity, autonomy, self-respect, self-worth, self-realization and empowerment into legal decisions. Additionally, if claimants throughout history sat back and allowed society to direct social values without disruption to such values, change within the judiciary may not have happened. This means claimants such as Edwards and the Famous Five in the Person's Case, Dr. Morgentaler, Lee Carter, Sue Rodriguez, and many others would have watched the world stand still. Instead, they stood up and demanded change, and the judiciary was able to deliver.

Now that we have officially reached the end, I hope that I have been able to teach you something about the current state of affairs for people with disabilities in Canada. I want to thank Professor Reem Bahdi at Windsor Law for her guidance during this process, for answering my constant emails at all hours of the day, for meeting with me at a moment's notice, and for encouraging creativity within the stuffy old-school discipline we call law. I would also like to thank Yvonne Peters for her time and contribution to this discussion, please check out her on-going with the International Committee at the Council of Canadians with Disabilities. I would like to thank Heather Walkus for her time and effort, please check out her on going advocacy work at CCD and her work around Guide and Service Dogs. I would like to thank Dr. Laverne Jacobs for her time and contribution to this discussion, in particular the great conversations we had about the on-going systemic issues occurring within our community, please check out the Law, Disability, and Social Change project that was founded by Dr. Jacobs at Windsor Law.

Stay safe, social distance, and access government and community resources for mental health and wellness support during this time.

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