

DIGNITY AND AUTONOMY AFTER WASHINGTON V. GLUCKSBERG: AN ESSAY ABOUT ABORTION, DEATH, AND CRIME

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INTRODUCTION

It is time to rescue dignity and autonomy. Recent injudicious use, overuse, interlacing and intertwining threaten to turn these concepts into one meaningless slogan. Understandably, we are drawn to their timeless and seductive appeal. Dignity is that exalted state of worthiness that every person possesses. Dignity is next to Kant who is behind virtually all modern bioethical queries (and attempts at answers). Autonomy—"do your own thing"—is next to Mill, and more recently Dworkin, and is the liberal community's somnambulistic mantra. Dignity and autonomy are each so necessary in the liberal state that we feel we must have them both in the same and equal doses. Unfortunately, we habitually link them in such a manner that they appear to be one and the same concept.

The Supreme Court has recently characterized the decision to have an abortion as one "central to personal dignity and autonomy."¹ Advocates for physician-assisted suicide have argued that the right to end one's life is no less "central to personal dignity and autonomy,"² and some courts have agreed.³ For example, the Ninth Circuit recently announced that prescriptions for lethal medication are central to dignity and

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¹ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (O'Connor, Kennedy, & Souter, JJ.).

² See, e.g., Respondent's Brief *passim*, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (No. 96-110) [hereinafter Respondent's Brief]; Brief for Ronald Dworkin et al., as Amici Curiae in Support of Respondents *passim*, *Glucksberg*, 117 S. Ct. 2258 [hereinafter the Philosophers' Brief]; Brief Amici Curiae of Americans for Death with Dignity and the Death with Dignity Education Center in Support of Respondents at 4-5, *Glucksberg*, 117 S. Ct. 2258; Amicus Curiae Brief of Surviving Family Members in Support of Physician-Assisted Dying at 6-7, *Glucksberg*, 117 S. Ct. 2258; Brief Amici Curiae of Council for Secular Humanism and International Academy of Humanism in Support of Respondents at 6-8, *Glucksberg*, 117 S. Ct. 2258; Brief Amicus Curiae of Julian M. Whitaker, M.D., in Support of Respondents at 9-10, *Glucksberg*, 117 S. Ct. 2258.

³ See *Compassion in Dying v. Washington*, 79 F.3d 790, 814, 839 (9th Cir. 1996), *rev'd sub nom.* *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *Michigan v. Kevorkian*, No. 93-

autonomy,⁴ and advocates of physician-assisted suicide urged the Supreme Court to uphold the Ninth Circuit's decision.⁵

In *Washington v. Glucksberg*,⁶ the Supreme Court ultimately rejected the dignity and autonomy argument, barely giving it passing mention in a unanimous reversal of the Ninth Circuit.⁷ Relying instead on history and tradition, the Court, in an opinion written by Chief Justice Rehnquist, held that the Fourteenth Amendment's Due Process Clause was not offended by the State of Washington's ban against assisted suicide.⁸ The Court's opening statement following the question of the case portends the opinion's conclusion: "It has always been a crime to assist a suicide in the State of Washington."⁹ *Glucksberg's* analysis, suggested by some precedent, continues closely along that line, asking whether a right to assisted suicide is "deeply rooted in this Nation's history and tradition"¹⁰ and "'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [it] were sacrificed.'"¹¹ The answer was a foregone conclusion considering the seven hundred year common law tradition disapproving of assisted suicide.¹²

According to the Court, the reliance of the respondents and the lower court upon the rhetoric of certain earlier substantive due process cases—namely *Cruzan v. Director, Missouri Department of Health*¹³ and

11482, 1993 WL 603212, at *19 (Mich. Cir. Ct. Dec. 13, 1993), *rev'd*, 527 N.W.2d 714 (Mich. 1994).

⁴ See *Compassion in Dying*, 79 F.3d at 814, 839.

⁵ See *supra* note 2 & accompanying text.

⁶ 117 S. Ct. 2258 (1997).

⁷ *Id.* at 2269-70 (1997); see also *Vacco v. Quill*, 117 S. Ct. 2293, 2301 (1997) (holding New York's prohibition on assisting suicide does not violate the Equal Protection Clause), *rev'g* 80 F.3d 716 (2d Cir. 1996).

⁸ See *Glucksberg*, 117 S. Ct. at 2261.

⁹ *Id.* In *Glucksberg*, the Court discusses at length the long history of prohibitions against assisted suicide. *Id.* at 2263-67. "[F]or over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide." *Id.* at 2263. "To hold for the respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State." *Id.* at 2269.

¹⁰ *Id.* at 2268 (quoting Moore v. East Cleveland, 431 U.S. 484, 503 (1977) (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

¹¹ *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). It is not clear under the Court's analysis whether the asserted right must be *both* deeply rooted in history and tradition *and* implicit in the concept of ordered liberty, or whether, as suggested by the language of *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (upholding Georgia's sodomy statute), these might be two alternative analyses. See *Michigan v. Kevorkian*, No. 93-11482, WL 603212, at *8 (Mich. Cir. Ct. Dec. 13, 1993), *rev'd*, 527 N.W.2d 714 (Mich. 1994) (maintaining that these descriptions provide two distinct but related routes to finding a fundamental liberty right). The Court in *Glucksberg*, with its reliance upon the long history of legal prohibitions against assisted suicide, appears to treat the tests as combined, or at least highly interdependent.

¹² See *Glucksberg*, 117 S. Ct. at 2263.

¹³ 497 U.S. 261 (1990) (upholding Missouri's requirement of clear and convincing evidence of an incompetent patient's wishes concerning the withdrawal of life-sustaining treat-

*Planned Parenthood v. Casey*¹⁴—was misplaced. The Court noted that in *Cruzan*, “the right assumed . . . was not simply deduced from abstract concepts of personal autonomy.”¹⁵ Referring to *Casey*, the Court added “[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.”¹⁶ With respect to the earlier privacy/liberty decisions that *Casey* cited as protecting “choices central to personal dignity and autonomy,” the Court characterized them as being less about grand ideas of dignity and autonomy (ignore the fact that liberty must bear some resemblance to autonomy), and more about marrying and raising a family.¹⁷ As opposed to killing oneself, the decisions involved in marriage and raising a family are historically sacrosanct.

Glucksberg, of course, will be interpreted in many ways. Some will see it as reflecting a now dominant preference for states’ rights and principles of federalism.¹⁸ Others will emphasize its display of judicial re-

ment). *Cruzan* is often mistakenly cited as establishing a right of competent individuals to hasten their deaths by refusing artificially provided life-sustaining nutrition and hydration. See, e.g., *Compassion in Dying v. Washington*, 79 F.3d 790, 816 (9th Cir. 1996), *rev’d sub nom. Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); Respondent’s Brief at 23. During oral arguments in *Glucksberg*, Justice Kennedy corrected the respondent’s attorney’s mischaracterization of *Cruzan* as recognizing (rather than merely assuming for purposes of the decision) a liberty interest of any kind, see *In the Supreme Court of the United States*, 12 ISSUES L. & MED. 393, 409-10 (1997) (Oral Arguments in *Glucksberg*), and the opinion of the Court confirms that *Cruzan* involved the assumption of a liberty interest as it upheld the Missouri law in question, rather than a recognition of a liberty interest. See *Glucksberg*, 117 S. Ct. at 2270.

¹⁴ 505 U.S. 833 (1992).

¹⁵ *Glucksberg*, 117 S. Ct. at 2270.

¹⁶ *Id.* at 2271.

¹⁷ See *id.* at 2270 (explaining that the Court’s opinion in *Casey*—relied upon heavily by respondents and the Ninth Circuit Court of Appeals for its apparent embrace of broad principles of individualism—drew on the Court’s tradition of interpreting the Due Process Clause of the Fourteenth Amendment “to protect certain fundamental rights and ‘personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education’”) (quoting *Casey*, 505 U.S. at 581). Later, the Court explained away *Casey*’s expansive language, see *infra* note 25, as a way of describing, “in a general way and in light of our prior cases, those personal activities and decisions” that the Fourteenth Amendment protects. *Id.* at 2271. In a corresponding footnote, the Court described those decisions cited in *Casey* as primarily protecting marriage and the family. See *id.* at 2271 n.19. *Bowers v. Hardwick* similarly dismissed such earlier cases as inapplicable: “No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . .” 478 U.S. 186, 191 (1986). Justice Blackmun’s dissent in *Bowers* criticized the characterization of the earlier cases as protective merely of the family, rather than as a more expansive “‘right to be let alone’” that includes the interests of individuals “in controlling the nature of their intimate associations with others.” *Id.* at 199, 204-06 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

¹⁸ See Ralph A. Rossum, *Power to the States; The Supreme Court’s Defense of Federalism*, SAN DIEGO UNION-TRIB., July 23, 1997, at B5 (linking the physician-assisted suicide cases with others from the same term that “[struck] bold precedents for federalism”); Bruce

straint¹⁹—evidence, perhaps, that the Court has learned from the criticism it suffered for recognizing a constitutional right to abortion in *Roe v. Wade*.²⁰ The Court's reluctance to engage in a discussion of the role of dignity and autonomy in constitutional jurisprudence and its retreat into history may indeed be partly explained by federalist leanings or judicial restraint. But the suggestion that constitutionally protected rights and liberties are restricted to those already recognized in our history and tradition should concern us all. Even the cases that *Glucksberg* considers "concrete examples"²¹ of fundamental rights already protected by the Constitution—for example, the right to marry interracially and the right to have an abortion²²—were hard-fought battles precisely because the specific practices given constitutional protection by those cases had long been outlawed.²³

I believe that the Court was right in determining that the liberty protected by the Fourteenth Amendment does not extend to physician-assisted suicide. But the Court's quick and neglectful dismissal of the appeals to dignity and autonomy, made for so long by so many advocates of the right to die, is disappointing. Engaging in a discussion of dignity

Fein, *Year of Justice Scalia*, WASH. TIMES, July 1, 1997, at A15 (describing *Washington v. Glucksberg* and *Vacco v. Quill* along with other cases from term, such as *Printz v. United States*, 117 S. Ct. 2365 (1997) (holding portion of Brady Act unconstitutional), as revealing the triumph of Scalia's "interpretive doctrine of original meaning"). Interestingly, Fein characterizes Scalia's opinion in *Printz* as protecting the "dignity and autonomy" of the states "acknowledged by the 10th Amendment." Fein, *supra*, at A15.

¹⁹ See *They're No Philosopher-Kings*, PROVIDENCE J.-BULL., July 17, 1997, at B6 (describing Supreme Court's rulings in *Glucksberg* and *Quill* as "healthy example[s] of judicial restraint"). The Court clearly placed some importance on the existence of an ongoing public debate over physician-assisted suicide, characterizing its ruling as one of judicial restraint: "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society." *Glucksberg*, 117 S. Ct. at 2275; see also Larry I. Palmer, *Constitutional Analysis and Physicians' Rights After Vacco v. Quill*, 7 CORNELL J.L. & PUB. POL'Y (forthcoming 1998) (focusing on *Quill* as the more important case for setting the stage for legislative debate and action in the issue of physician-assisted suicide). "All of the Justices concluded [in *Glucksberg* and *Quill*] that the legislature is the legal forum for defining which patient actions are self-killing or suicide . . . [and] which physician acts constitute legally impermissible assistance in patient deaths." *Id.*

²⁰ See John Carlson, *Washington Had a Hand in 2 Rulings Reaffirming States' Rights*, NEW TRIB., July 2, 1997, at A9 (ruling shows "reluctance to embrace the logic on which the *Roe v. Wade* decision was made"); David G. Savage, *High Court Refuses to Grant Constitutional "Right to Die" Assisted Suicide*, L.A. TIMES, June 27, 1997, at A1 (Court's approach "stands in sharp contrast to its active intervention in the abortion controversy").

²¹ *Glucksberg*, 117 S. Ct. at 2268.

²² *Id.* at 2267, 2271 n.19 (listing, among other cases, *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage) and *Casey*); see also *supra* note 17.

²³ See *Loving v. Virginia*, 388 U.S. 1, 6 (1967) (explaining that Virginia was one of sixteen states prohibiting interracial marriages; penalties for miscegenation had been common in the state since the colonial period; and the statutory scheme under question dated from the adoption of the Racial Integrity Act of 1924); *Roe v. Wade*, 410 U.S. 113, 119 (1973) (stating that Texas had enacted its first criminal abortion statute in 1854).

and autonomy alongside a discussion of history and tradition would not have required a decision in favor of the respondents in *Glucksberg*, and could have continued a modern, developing discussion about the role of ancient principles in shaping legal rights. Moreover, it could have shaped and brought order to the dignity and autonomy discussion.

Dignity and autonomy are in quite a useless muddle. The disorder that characterizes discussions of dignity and autonomy stems from two failures—the failure to distinguish between the two terms and the failure to define them. As dignity and autonomy, through careless and easy use and overuse, have become less precisely defined and more inseparable and interchangeable, the illuminating potential of the two concepts has diminished. It is easy to appeal to dignity and autonomy—and the Supreme Court has contributed to that ease—but it has not come without cost.

Consider the Philosophers' Brief (as it has been named²⁴)—a *Glucksberg* brief filed by six leading philosophers in support of a right to physician-assisted suicide. The Philosophers' Brief is ultimately an unsuccessful mélange of abstract ideals and properly bluebooked legal precedent. Relying (as supporters invariably do) on the grandiloquent language of the Court in *Casey*—about dignity, autonomy and determining the meaning of one's own existence²⁵—the Philosophers' Brief fails to translate those terms according to the contexts in which they are used. We might expect to find more attention to these fine and critical details in such a brief. Failing to recognize that the terms “dignity” and “autonomy” carry different meanings in philosophical discourse, in legal discourse, and in the vernacular, the brief also fails to build the necessary bridges between these understandings. In particular, the dignity that philosophers speak of is not generally the dignity that the Supreme Court relied upon in *Casey* or the dignity that Jack Kevorkian is said to promote in the back of his fatally equipped Volkswagen van.²⁶ Perhaps more significantly, dignity and autonomy often *do not* refer to the same thing, and in this regard it is worth noting that we have been witnessing a

²⁴ See Ronald Dworkin et al., *Assisted Suicide: The Philosophers' Brief*, N.Y. REV. BOOKS, Mar. 27, 1997, at 41.

²⁵ The often quoted language of *Casey* is as follows:

These matters [decisions relating to marriage, procreation, contraception, family relationships, child rearing and education], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

505 U.S. at 851; see *infra* text accompanying notes 48-52.

²⁶ See Brian Harmon, *Kevorkian Van Might Fetch \$50,000 as Museum Piece*, DET. NEWS, Mar. 6, 1997, at A13 (reporting that because Kevorkian “has helped several people die in the back of his rusted Volkswagen van, the vehicle's curiosity value has soared.”).

death with dignity movement over the last decade and not a death with dignity *and* autonomy movement.

The muddle is both understandable and lamentable. It is understandable because the Court has a history of using the terms dignity and autonomy without defining them (especially dignity) or distinguishing them. It is lamentable because the principles for which the words variously stand certainly have critical value for guiding our thinking with respect to rights. We do not have to adopt the recent course chosen by the Supreme Court and rigidly isolate categories of behavior that are walled off for protection, leaving no portals for other activities to receive similar refuge. At the same time, a liberal etherealization resulting from rampant imprecision in the use of the terms dignity and autonomy almost forces that result; the terms have become so unworkable that we should not be surprised that the Supreme Court did not engage in a frontal assault on the respondents' and others' reliance on these appealing concepts.

It is time to attempt a rescue of dignity and autonomy by critically examining the two concepts and their relationship to one another. We must separate these conjoined siblings in order to save them. Separated, they can mean something, and not only in airy philosophical quarters, but also in the structure of legal rights.

Autonomy speaks volumes, and volumes have been justly spoken about it. It is variously understood to mean consent,²⁷ freedom of choice,²⁸ the ability to act independently of others,²⁹ and self-determina-

²⁷ See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 128 (4th ed. 1994) ("The basic paradigm of autonomy in health care, politics, and other contexts is *express* and informed consent.") (emphasis in original); ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* 27-78 (1993) (taking Richard Posner to task for suggesting, in defense of the wealth maximization precepts of law and economics, that autonomy might be equated with consent: A person may consent to submit to authority, and "[s]ome such relationships promote autonomy. . . . [m]any, however, do not," *Id.* at 46). Using Franz Kafka's stories of individuals who willingly submit to authority, not to maximize their well-being (which is the goal of Posner's rational actors in making choices), but "because of a felt compulsion to legitimate the will of an authority," *Id.* at 75, West argues that focusing purely on momentary consent improperly makes motives and effect irrelevant, and in the process neither autonomy nor well-being are necessarily served.

²⁸ Justice White's separate opinions in the abortion cases reveal an understanding of autonomy as freedom of choice—where what matters is who makes the ultimate decision—rather than a broader view of autonomy as self-determination—which requires more restraint on the part of the state in attempting to influence a woman's decision. See *infra* note 47.

²⁹ For an interesting discussion of autonomy as either independence or choice, see Charles W. Lidz & Robert M. Arnold, *Rethinking Autonomy in Long Term Care*, 47 U. MIAMI L. REV. 603, 608 (1993), who discuss the inadequacies of these views of autonomy in the context of long-term care for the elderly. Because it still makes sense to speak about the autonomy of elderly residents in long-term care facilities, even though they may be highly dependent upon others for daily care, autonomy understood as independence, according to these authors, misses the mark. They also criticize the understanding of autonomy as choice because this view fails to address the reality of daily living at most long-term care facilities—

tion.³⁰ Feminists, critical legal scholars, and communitarians have assailed the domination of autonomy in modern legal discourse; and the liberal community has vigorously defended it.³¹ Autonomy, unlike dignity, has not been neglected. In my argument to follow, I do not focus on what autonomy means separately from dignity. Instead, I argue that each of the various ways we define dignity (which has *not* received the critical attention it deserves) renders the linking of the two terms problematic—no matter which definition of autonomy we favor. Thus, by relying on dignity and autonomy as an indistinguishable and inseparable pair, the Supreme Court has provided an inadequate foundation for recognizing the constitutional rights that appear, at times, to rest upon the two concepts.

This article begins by discussing the abortion cases because it is in that context that dignity and autonomy became prominently linked with such an indelible flourish. Although right-to-die advocacy has relied ex-

there simply are not many choices for residents to make. To say that we are respecting the autonomy of these elderly residents by letting them choose ignores the fact that there is so little for them to decide.

³⁰ When there is fundamental disagreement on the principles that should govern our behavior, such as in the context of abortion and physician-assisted suicide, we see appeals to autonomy as self-governance at this high form: let people live according to their own morality. This would appear to correspond to a Kantian notion of autonomy, which has been summed up in the following way: “[A]utonomy is said to be a property of human *wills*; to have a will Kant says, is to have “the power to act in accordance with [one’s] idea of laws . . . [or] principles. . . .” THOMAS E. HILL, JR., *DIGNITY AND PRACTICAL REASON IN KANT’S MORAL THEORY* 84 (1992). An individual in possession of autonomy has the power to discern the principles by which she will live, and to make choices and to perform actions consonant with those principles. Words like “self-determination” and phrases like “creating one’s own destiny” are most often used to describe this conception of autonomy. It is in those areas of one’s life where decisions will profoundly affect not only the quality of one’s life, but *who one is*, that we see a willingness to recognize an individual’s ability to make, not only her own choices, but her own *rules*.

³¹ Recent work has tried to find middle ground between traditional liberal individualism and its critics. See, e.g., Linda C. McClain, “*Atomistic Man*” Revisited: *Liberalism, Connection, and Feminist Jurisprudence*,” 65 S. CAL. L. REV. 1171, 1176 (1992) (“The feminist argument that liberalism reflects an ethic of justice and rights but ignores an ethic of care and responsibility that reflects women’s experience overdraws the distinction between those two ethics and overlooks the fact that both ethics can be found in liberalism.”); Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C. L. REV. 1323 (1995) (arguing that relational feminism and radical feminism might find middle ground with a conception of autonomy supplemented by relation and care); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 9 (1989) (“Feminists angrily reject the tradition of liberal theory that has felt so alien, so lacking in language and ability to comprehend our reality, and that has been so successful in defining what the relevant questions and appropriate answers are. Anyone who has listened closely to academic feminists will have heard this undercurrent of rage at all things liberal. Yet liberalism has been the source of our language of freedom and self-determination.”) (citations omitted); Thomas E. Hill, Jr., *The Importance of Autonomy*, in *WOMEN AND MORAL THEORY* 129 (Eva Feder Kittay & Diana T. Meyers eds., 1987) (arguing that our “autonomy-glorifying tradition” is compatible with recognition of the moral importance of compassion.”).

tensively upon *Casey*, dignity and autonomy have been a linchpin of abortion jurisprudence since *Thornburgh v. American College of Obstetricians and Gynecologists*.³² In Part I, I argue that while in rhetoric dignity is given equal play with autonomy, practically it is useless, irrelevant, invisible. Dignity in the context of abortion precedent requires nothing more than respecting the autonomous actions of rational persons. That definition seems harmless enough (abortion rights could rest on autonomy alone), until we consider that minors have abortion rights too, and yet by definition, we do not respect their autonomous actions. Autonomy and this empty form of dignity cannot, then, provide a full and adequate basis for abortion rights. Relying as we have on the dignity/autonomy concept, we have failed to pierce the rich obscurity that grounds abortion rights.

In Part II, we move from the inadequacy of the dignity/autonomy concept in the abortion cases to the more troublesome (and, we must suppose, unintentional) misuse of the concept in physician-assisted suicide advocacy. These advocates have misappropriated the central “dignity and autonomy” language of abortion rights precedent. Dignity in the context of the death with dignity movement is not simply about respecting the autonomous actions of rational persons. Instead, it is about the way one dies—in pain or in sleep, wasted or meaty, mumbling or howling, or humming. It is also about the way one lives in the dwindling days, weeks, and years of life—useful or useless, admired or pitied, sought or avoided, and again, mumbling or howling, or humming. Dignity is emphatically not simply about making choices, and therefore, not simply about autonomy. In fact, this kind of dignity has a very tenuous relationship with autonomy and, pushed to the extreme, is the *opposite* of autonomy. The doubleness of dignity-talk in right to die advocacy—*talking* the “making choices” dignity, but *meaning* the “live and die well” dignity—may well have sullied dignity to the extent that it will be overlooked as a possible cornerstone for future constitutional rights. This is a shame because the concept has done quite well in criminal defense cases and should be able to serve us well in considering other rights.

In Part III, I argue that a third way of understanding dignity—as the intrinsic and unconditional worth of all human beings—has admirably served our needs in providing a basis for the constitutional rights of criminal defendants, such as the right to trial, and the rights against self-incrimination and cruel and unusual punishment. When we link this sort of dignity with autonomy, in that ready and indiscriminating appeal to “dignity and autonomy”—as in the cases concerning the right to self-

³² 476 U.S. 747, 772 (1985).

representation—we risk diluting its potential. Separately and critically, however, it has much to offer. In conclusion, I speculate about what this broader meaning of dignity (considered separately and distinctly from autonomy) would add to the abortion and right to die contexts.

I. ABORTION: RIGHTS IN RICH OBSCURITY

A. DIGNITY AS AUTONOMY, OR A WARM, FUZZY GLOW

A number of Supreme Court opinions refer to the decision to have an abortion as “*basic to individual dignity and autonomy*.”³³ While the appeal to dignity and autonomy is perhaps at its height in the “soaring language”³⁴ of the 1992 case of *Planned Parenthood v. Casey*³⁵ (which has uncharitably been described as “jurisprudence worthy of Murphy Brown”),³⁶ the conjoining of the two concepts appeared as early as 1986 in *Thornburgh v. American College of Obstetricians and Gynecologists*.³⁷ *Thornburgh* struck down a Pennsylvania law that required physicians to provide certain information about the abortion procedure to their patients, to report to the state information concerning patients seeking abortions, to exercise care to preserve the life of the fetus, and to have a second physician present during an abortion performed when the fetus might be viable.³⁸ Justice Blackmun, writing the opinion of the Court, explained that the Constitution promises that government will not intrude into an individual’s private sphere of liberty, and “[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman’s decision . . . whether to end her pregnancy.”³⁹

³³ *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986); see *Hodgson v. Minnesota*, 497 U.S. 417, 462 (1989) (Marshall, J., concurring in part and dissenting in part); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 548 (1989) (Blackmun, J., concurring in part and dissenting in part); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

³⁴ Yale Kamisar, *Against Assisted Suicide—Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735, 768 (1995) (referring to “the right to define one’s own existence” language, quoted *supra* note 25). Justice Kennedy is given credit for contributing this language to the opinion. See Jeffrey Rosen, *The Agonizer*, NEW YORKER, Nov. 11, 1996, at 88.

³⁵ 505 U.S. 833 (1992).

³⁶ Terry Eastland, *The Tempting of Justice Kennedy*, AM. SPECTATOR, Feb. 1993, at 32, 37.

³⁷ 476 U.S. 747 (1986).

³⁸ See *id.* at 758, 772.

³⁹ *Id.* at 772.

Although quoted frequently by the Supreme Court and lower courts in majority⁴⁰ and dissenting⁴¹ opinions, this dignity and autonomy language has lacked much helpful elaboration, especially the concept of dignity. In *Webster v. Reproductive Health Services*,⁴² Justice Blackmun added (in dissent) that the abortion decision is "uniquely personal, intimate, and self-defining"⁴³ and "quintessentially intimate, personal, and life-directing,"⁴⁴ appropriately understood as within that "'certain private sphere of individual liberty' that the Constitution reserves from the intrusive reach of government."⁴⁵ He continued that "[i]t is this general principle, the 'moral fact that a person belongs to himself and not others nor to society as a whole,' that is found in the Constitution."⁴⁶ The right to have an abortion under this line of analysis is grounded in a respect for an individual's capacity, desire, drive, and need for self-determination.⁴⁷

⁴⁰ See *Guam Soc'y of Obstetricians and Gynecologists v. Ada*, 962 F.2d 1366, 1373 (9th Cir. 1992) (striking down Guam's anti-abortion statute as unconstitutional); *Roe v. Operation Rescue*, 123 F.R.D. 500, 505 (E.D. Pa. 1988) (granting class certification to plaintiffs seeking to enjoin anti-abortion protestors from hindering the exercise of their rights to abortion).

⁴¹ See *Webster*, 492 U.S. at 548 (Blackmun, Brennan, and Marshall, JJ., concurring in part and dissenting in part). In *Webster*, the Court held, *inter alia*, that Missouri's statutory ban on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions and its statutory prohibition on the use of public funds to encourage or counsel women to have nontherapeutic abortions, were not unconstitutional. In addition, the Court interpreted Missouri's statute requiring viability testing on fetuses believed to be twenty or more weeks in gestational age in a way to avoid conflict with the Constitution. See also *Hodgson v. Minnesota*, 497 U.S. 417, 462 (1989) (Marshall, J., dissenting) (arguing that a Minnesota statute requiring two parent notification for a minor seeking an abortion and providing a judicial by-pass procedure to avoid the two parent notification was unconstitutional).

⁴² 492 U.S. 490 (1989).

⁴³ *Id.* at 548-49 (Blackmun, J., dissenting).

⁴⁴ *Id.* at 538.

⁴⁵ *Id.* at 548.

⁴⁶ *Id.* at 549 (quoting Justice Stevens' concurrence in *Thornburgh*, 476 U.S. at 777 n.5 (quoting C. Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288-89 (1977))). Stevens further quoted Fried: "What a person is, what he wants, the determination of his life plan, of his concept of the good, are the most intimate expressions of self-determination, and by asserting a person's responsibility for the results of this self-determination we give substance to the concept of liberty." *Thornburgh*, 476 U.S. at 777 n.5 (quoting C. FRIED, *RIGHT AND WRONG*, 146-47 (1978)).

⁴⁷ Contrast Justice Blackmun's analysis with the narrower approach of Justice White to understanding autonomy as centering around choice, or perhaps even consent. In his dissent in *Thornburgh*, White recognized that the right to abortion is grounded in a respect for individual autonomy and privacy, 476 U.S. at 797 (White, J., dissenting), but he centered that autonomy around freedom of choice. With this understanding, White found the majority's invalidation of the information requirements of the Pennsylvania statute "extraordinary." *Id.* at 799. "[A]fter all," he wrote, "*Roe v. Wade* purports to be about freedom of choice, and statutory provisions requiring that a woman seeking an abortion be afforded information regarding her decision not only do not limit her ability to *choose* abortion, but also would appear to enhance her freedom of choice by helping to ensure that her decision whether or not to terminate her pregnancy is an informed one." *Id.* (emphasis added). White is not concerned that the information may persuade a woman to change her mind; indeed, "[i]f the information may reasonably affect the patient's choice, the patient should have that information." *Id.* at 801.

It is all about autonomy. The mention of dignity in the same breath merely softens autonomy's rank egocentricity and lends it a warm and fuzzy glow.

Casey, as it reworked the language of *Thornburgh* with embellishment, might be understood as giving dignity slightly more due. First, *Casey* listed categories of personal decisions that the Constitution protects (as *Washington v. Glucksberg* would later do with a limiting effect).⁴⁸ These are decisions "relating to marriage, procreation, contraception, family relationships, child rearing, and education."⁴⁹ But instead of suggesting (as *Glucksberg* later does)⁵⁰ that these are sealed categories tagged for protection by tradition, *Casey* attempted to provide a more convincing theoretical (and theatrical) basis for them:

As contrasted to Justice White's approach, autonomy under the legacy of *Thornburgh* would mean more than choice. The majority in *Thornburgh* was concerned that the information supplied to the pregnant woman would not inform the woman's consent, but "persuade her to withhold it altogether." 476 U.S. at 762 (quoting Akron Ctr. for Reprod. Health, Inc. v. City of Akron, 462 U.S. 416, 444 (1983)). The potentially coercive effect of certain information would impair the woman's independence in creating her own future, defining her self.

Casey, of course, overruled *Thornburgh* regarding whether states may require physicians to provide certain state-prescribed information to women seeking abortions. *Casey*, 505 U.S. at 882. *Casey* held that states may require physicians to provide truthful, nonmisleading information about the nature of the abortion procedure, the comparative health risks of abortion and those of childbirth, and the probable gestational age of the fetus. *Id.* The Court, using its undue burden analysis, permits states to enact legislation "aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." *Id.* at 883. A state measure designed to persuade a woman to choose childbirth over abortion may pass constitutional muster as long as it does not present a substantial obstacle to the woman's right to choose. *See id.* at 878.

Casey's approval of the information requirements imposed on physicians (and their patients) might appear to indicate a retreat from *Thornburgh's* expansive understanding of autonomy. One might surmise that the Court in *Casey* moved toward a narrower understanding of autonomy, one more focused on consent than self-determination, closer to White's position in *Thornburgh*. This may not be the case, however. Although the Supreme Court's decision in *Casey* permitted information that might even persuade a woman to change her mind about undergoing an abortion procedure, it did not necessarily adopt a narrower understanding of autonomy. Rather, it adopted a broader deference to the state's interest in protecting fetal life. *See id.* at 876. Indeed, it may have also adopted a more expansive definition of autonomy, even if the ultimate protected liberty interest in abortion was scaled back. The language quoted in the text, *see infra* text accompanying note 51, is most central to the opinion's position and to the opinion's reception. It supports a broad notion of autonomy as freedom to define one's self.

⁴⁸ *See Casey*, 505 U.S. at 851; *supra* note 17 (quoting *Glucksberg*).

⁴⁹ *Casey*, 505 U.S. at 851 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1967); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944)). *Casey* cited several other cases to support the proposition that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood." *Id.* at 849 (citing *Moore v. East Cleveland*, 431 U.S. 494 (1977); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

⁵⁰ *See supra* note 17.

These matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy*, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own existence, of meaning, of the universe, and of the mystery of human life. *Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.*⁵¹

This passage suggests a definition for dignity: it is our capacity to form beliefs about matters of marriage, procreation, contraception, family relationships, child rearing, and education that "define[s] the attributes of personhood."⁵² In the more traditional language of philosophers, it is the capacity to make self-defining decisions that distinguishes humans from other creatures and gives them *dignity*.⁵³ Dignity, then, is the moral status appropriate to beings with the capacity for self-determination. Dignity is conditioned on rationality.⁵⁴

⁵¹ 505 U.S. at 851 (emphasis added). As already noted in the text, the expansive language of this passage has been received with some derision. In Justice Scalia's separate opinion in *Casey*, he explained that he reached the conclusion that there is no constitutionally protected abortion right "not because of anything so exalted as my views concerning the 'concept of existence, of meaning, of the universe, and of the mystery of human life.'" *Id.* at 980. (Scalia, J., concurring in part and dissenting in part).

Likewise, in his dissenting opinion in *Compassion in Dying v. Washington*, Circuit Judge Beezer wrote: "Taken out of context, the 'right to define one's own concept of existence' is so broad and melodramatic as to seem almost comical in its rhetorical flourish." 79 F.3d at 850. But he continued that "the preceding sentence in *Casey* [referring to the "personal dignity and autonomy" passage] provides a more somber and usable definition of liberty." *Id.*

Justice Scalia, however, pointedly disagrees with the usefulness of the dignity and autonomy language. Listing the phrases used by the plurality to describe the right to abort—such as, "most intimate and personal choic[e]," "a person's most basic decisions," "originate[s] within the zone of conscience and belief," and, of course, "central to personal dignity and autonomy"—Scalia argued that these could just as easily describe "homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally 'intimate' and 'deep[ly] personal' decisions involving 'personal autonomy and bodily integrity,' and all of which can be constitutionally proscribed. . . ." 505 U.S. at 983-84 (Scalia, J., concurring in part and dissenting in part).

⁵² *Casey*, 505 U.S. at 851.

⁵³ In Kantian theory, the distinctly human ability to reason about moral problems and then to make moral decisions or take moral action is understood in terms of the "rational will." IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 52-66 (Robert Paul Wolff ed., 1969) [hereinafter "METAPHYSICS OF MORALS"]; see also JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 82 (1990).

⁵⁴ Kant himself does not appear to contemplate situations where an individual lacks rational powers. See, e.g., METAPHYSICS OF MORALS, *supra* note 53, at 52-66. But Robert Goodin sums up Kant's position as follows: "Kant, tightening this ancient link between dignity and 'autonomy,' holds that a man leads a dignified existence worthy of moral respect because (and only insofar as) he is self-legislating, overcoming natural necessity and willing his own actions." Robert E. Goodin, *The Political Theories of Choice and Dignity*, 18 AM. PHIL. Q. 91, 95 (1981). Recognizing that Kant's intentions are not entirely clear, Goodin

The overall effect of the language of the abortion cases is a strong statement of autonomy understood as self-determination, and an understanding of dignity as the moral status appropriate to persons who have the capacity for self-determination and who can thus form beliefs about intimate and personal matters. We respect people because they can make choices (they have dignity), and so we must respect the choices they make (by permitting autonomous action). Dignity in the abortion decisions is not considered separately from autonomy. Like autonomy, dignity is about respecting life-directing decisions, nothing more or less.

B. THE IMMATURE MINOR: BEST INTERESTS RULE, NOT DIGNITY-AUTONOMY

That dignity adds nothing to autonomy in the abortion cases is made even clearer by the conspicuous absence of references to "dignity and autonomy" in the abortion cases dealing with minors.⁵⁵ The abortion right for immature minors (minors who lack the "experience, perspective, and judgment"⁵⁶ to make important decisions) is not based on dignity and autonomy; it cannot be, because immature minors, by definition, lack the autonomous capacity to make the abortion decision.

To recognize the constitutional right of minors to have an abortion, *Bellotti v. Baird* and similar cases rely on the general maxim that minors possess constitutional rights like adults, and thus female minors possess a right to abortion.⁵⁷ Because of the unique status of minors, however, states may impose greater restrictions on the exercise of a minor's abortion rights.⁵⁸ For example, states may require parental notification or consent prior to a minor's undergoing an abortion as long as an adequate

writes that "it has now become commonplace to substitute 'capacity for choice' for 'dignity.'" *Id.* at 96. Goodin believes this conception of dignity is incomplete, because it focuses on *choices* rather than on *people*. He cites another Kantian aphorism as more instructive, the fact that a person can have "the idea of an 'I'" and thus is "capable of possessing a self-image and self-respect." *Id.* Thus, for Goodin it is the fact that a person can respect herself that provides us with a reason to respect her in turn. *See id.* Dignity, then, "consists in self-respect." *Id.* at 99. A self-image and self-respect, however, still require a degree of rationality that many individuals lack.

⁵⁵ The plurality opinion in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 520 (1990), did, in its conclusion, make confusing references to the "destiny and personal dignity" of the woman and also to the "dignity" of the family. The Court in that decision upheld the parental notification statute at issue. In dissent, Justice Blackmun accused the plurality of "indulg[ing] in paternalistic comments" and hyperbole "to further incite [the] American press, public, and pulpit." *Id.* at 541 (Blackmun, J., dissenting).

⁵⁶ *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

⁵⁷ *See id.* at 633 ("A child, merely on account of his minority, is not beyond the protection of the Constitution.").

⁵⁸ The Court in *Bellotti* recognized that the status of minors is unique and that the constitutional rights of children are distinguishable from those of adults. *Id.* at 633-35. "[A]lthough children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for chil-

judicial procedure allowing the minor to bypass such notice or consent requirements is available.⁵⁹ To be adequate, a judicial bypass procedure must allow a minor to show either that she is well-informed and mature enough independently to make the decision to abort (being, therefore, a mature minor) or that, lacking such maturity (being an immature minor), an abortion would be in her best interests.⁶⁰

It is plain to see that the judicial bypass procedure may respect the autonomy and corresponding dignity of the *mature* minor, one who is capable of making life-directing decisions—just like an adult. But on what basis is the abortion right recognized as belonging to an *immature* minor? Not on autonomy; a judge (if the judicial bypass procedure is invoked), parent or guardian makes the ultimate decision whether the minor may have the abortion, not the minor. Is dignity the basis for the right? Not an understanding of dignity that requires us merely to respect the autonomous decisions of others—the understanding of dignity embraced by the abortion decisions generally. In fact, the Court appeals to neither autonomy nor dignity to define the immature minor's abortion right. Instead, the Court relies on a sleight of hand by proclaiming that minors have the same rights as adults (but maybe with some built-in safeguards).⁶¹

If immature minors lack dignity and autonomy in the sense that *Casey* and other abortion cases use those terms, then what compels the Supreme Court to recognize a minor's right to abortion? *Bellotti* and its progeny do not lay a separate constitutional foundation for the abortion right of immature minors. Therefore, we must look at the mechanism chosen to allow exercise of the right. As noted above, the cases provide a judicial bypass procedure through which the immature minor may essentially obtain consent from the court to have an abortion, if the judge is convinced that an abortion would be in the minor's *best interests*. It is not clear how we get from the adult woman's dignity and autonomy to the minor's best interests—or, perhaps what is going on is too clear. What drives the Court here is not autonomy or dignity but raw need.

The immature minor cases illustrate that the abortion right, since we are willing to recognize it for individuals who lack autonomy, need not be grounded, or at least not grounded exclusively, in "dignity and auton-

dren's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'" *Id.* at 635 (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)).

⁵⁹ See *id.* at 640-41; see also *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). But see *Lambert v. Wicklund*, 117 S. Ct. 1169 (1997) (upholding state statute that required court to authorize a minor's consent to abortion without parental notification when the immature minor showed that the *notification* (as opposed to the abortion itself) was not in her best interests).

⁶⁰ See *Bellotti*, 443 U.S. at 643-44; see also *Casey*, 505 U.S. at 877.

⁶¹ See *Bellotti*, 443 U.S. at 633.

omy” even for adult women. If the best interests of a minor are compelling enough to support the minor’s right to an abortion, why would they not also be adequate to support an adult woman’s right to an abortion? Perhaps they are.

Casey, both in the plurality opinion and in Justice Blackmun’s separate opinion, expressed compassion for the suffering of women who face unwanted pregnancies. The Court explained that “[t]he mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear,” and that “[h]er *suffering is too intimate and personal* for the State to insist, without more, upon its own vision of the woman’s role. . . .”⁶² Is it the “intimate and personal” nature of the *choice* that governs here, as *Casey*’s eloquent language would indicate, or is it the “intimate and personal” nature of the *suffering*?⁶³

Justice Blackmun was more explicit about the harms of unwanted motherhood in his separate opinions in *Casey* and *Roe v. Wade*. In *Casey*, he wrote:

By restricting the right to terminate pregnancies, the State conscripts women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course.⁶⁴

Blackmun’s majority opinion in *Roe* contains similar language:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the

⁶² *Casey*, 505 U.S. at 851. We might compare this with similar language from *Bellotti*, establishing the immature minor’s right to an abortion if it is in her best interests: “Moreover, the potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor.” *Bellotti*, 443 U.S. at 642 (citations omitted).

⁶³ See Brief for the United States as Amicus Curiae Supporting Petitioners at 13, *Glucksberg*, 117 S. Ct. 2258 (citing *Casey* for the proposition that “among other things, a prohibition on abortion interferes with a woman’s liberty interest in avoiding potential physical and mental suffering associated with unwanted pregnancy and government-compelled childbirth”).

⁶⁴ *Casey*, 505 U.S. at 927 (Blackmun, J., concurring, in part and dissenting in part).

problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.⁶⁵

Thus, the Court and individual Justices seem to have in mind the “best interests” of the adult woman seeking an abortion as well.

C. THE INADEQUACY OF DIGNITY-AUTONOMY

From this discussion we can conclude that there are two problems with relying on “dignity and autonomy” as the basis for recognizing rights such as the abortion right when we understand dignity (along with autonomy) to require nothing more than respecting choices. First, the paired terms fail to reveal the basis of rights for those who are unable to exercise autonomy because of a lack of maturity or competency. The fact that the Constitution grants the same rights to competent adults is an unconvincing justification for recognizing such rights for those who are not competent or mature. As we have seen, the right of immature minors to have an abortion appears to be based on the immature minor’s best interests, which is not a concept derived from autonomy or dignity when dignity is treated just like autonomy. The Court, however, fails to lay the critical theoretical groundwork for such rights based on need. The implicit appeal to dignity and autonomy through the abortion decisions applicable to adult women disingenuously avoids difficult but necessary questions about the basis of rights for nonautonomous persons.

Second, autonomy by itself (and autonomy is essentially by itself because dignity has been collapsed into it) cannot fully explain various rights we ascribe to competent individuals either. While respect for autonomy may, perhaps, explain some of these rights, it is an inadequate explanation for other rights that, like abortion, are accorded to both competent and incompetent individuals alike. Whatever impels us to recognize the right for the incompetent individual must also influence our desire to recognize it for the competent individual. The immature minors’ abortion right depends, it appears, upon our recognition of their plight. We need to explore whether the adult’s right is similarly grounded (as suggested by *Casey* and *Roe*). Until we do, we will not fully understand the basis of the abortion right. To paraphrase the Court’s opening admonition in *Casey*, we cannot escape this inquiry by taking refuge in a jurisprudence of dignity and autonomy.⁶⁶

⁶⁵ 410 U.S. 113, 153 (1973).

⁶⁶ *Casey*, 505 U.S. at 843 (opening with: “Liberty finds no refuge in a jurisprudence of doubt.”).

II. DEATH WITH DIGNITY: DIGNITY AS THE RIGHT CHOICES, NOT THE RIGHT TO MAKE CHOICES

A. DIGNITY WITH SUBSTANTIVE CONTENT

Advocates of physician-assisted suicide and their court sympathizers have benefitted from the prominent use of the phrase "dignity and autonomy" in the abortion cases and the corresponding lack of any definitional content to the term "dignity." In 1994, Compassion in Dying, a Washington-based non-profit organization, several doctors and their patients sought invalidation of Washington's ban against assisted suicide.⁶⁷ They argued that a decision to hasten one's death with a lethal prescription is no less central to dignity and autonomy than the decision to have an abortion.⁶⁸ A federal district court⁶⁹ and then an *en banc* panel of the Ninth Circuit Court of Appeals agreed,⁷⁰ each calling *Planned Parenthood v. Casey* "highly instructive" and "almost prescriptive" on this point.⁷¹ The Ninth Circuit held that Washington's prohibition against assisted suicide unduly burdened a terminally ill patient's right to determine the time and manner of his death.⁷² The Supreme Court, of course, held differently in *Washington v. Glucksberg*.

Because dignity is devoid of significant content in the abortion cases, it is putty. Those who advocate recognition of a constitutional right to physician-assisted suicide can and did appropriate the evocative "dignity and autonomy" language of *Casey*. Assisted suicide advocates, however, use a quite different and more powerful meaning of dignity. In the abortion cases, dignity adds nothing substantive to the discussion of rights.⁷³ It is all (at least rhetorically) about autonomy. By contrast, in

⁶⁷ See *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1456-58 (W.D. Wash. 1994), *aff'd*, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.* *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

⁶⁸ Because *Compassion in Dying* assists individuals who commit suicide with self-administered medications, the organization feared that it might be criminally prosecuted under Washington's ban against any form of assisted suicide. The District Court did not address the claims of *Compassion in Dying* because they were not discussed in the briefs before the court on the parties' summary judgment motions. See *id.* at 1467. The Ninth Circuit Court of Appeals accordingly determined that the claims involving *Compassion in Dying* were not before it. See *Compassion in Dying v. Washington*, 79 F.3d 790, 797 (9th Cir. 1996), *rev'd sub nom.* *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

⁶⁹ See *Compassion in Dying*, 850 F. Supp. 1454.

⁷⁰ A panel of the Court of Appeals first reversed the District Court, but on rehearing the case *en banc*, the Ninth Circuit reversed the panel's decision and affirmed the District Court. See *Compassion in Dying*, 79 F.3d 790.

⁷¹ *Compassion in Dying*, 850 F. Supp. at 1459-60; *Compassion in Dying*, 79 F.3d at 813-14.

⁷² See *Compassion in Dying*, 79 F.3d at 816.

⁷³ See generally *supra* Part I.

right-to-die advocacy, dignity means everything. It is all (again, at least rhetorically) about dignity.⁷⁴

This dignity, however, is not the dignity of philosophers. It is the meaning of dignity that we find in everyday conversation: “the quality of being worthy or honourable; worthiness, worth, nobleness, excellence.”⁷⁵ When we say that someone acts in a *dignified* manner, we are saying something about her behavior, not merely acknowledging the actor’s ability to reflect upon her course of action and to act according to her choice (autonomy). Thus, we might consider an individual who meets an unfortunate fate with her head held high as acting with great dignity; an individual who babbles and cries is undignified. We want our public officials to act with dignity; we call some of them “dignitaries.” Our heroes act with dignity. It is not about winning; losers might lose with dignity. It is about deportment. It is about how others perceive us.

The right-to-die movement has appealed to this content-based definition of dignity for a long time. Advocates insist that individuals have the inherent right to die with dignity. The implicit idea is that health care providers too often treat dying patients with aggressive measures that do nothing more than prolong the dying process. By prolonging the dying process, doctors extend the period of time over which the patient suffers from a loss of dignity, suffers from impaired reason or memory, loses control over bodily functions, and becomes increasingly dependent upon others for the most basic needs.⁷⁶ Doctors might make the patient’s loss of dignity greater by administering heavily sedating medications to ease pain. Pain, it seems, pales in comparison to the burden of indignity. It is not specifically and predominantly pain that we are supposed to want to avoid in our final days, although pain is not discounted, but we are to avoid being helpless, incontinent, incoherent, dependent, drooling, a burden to others, and of poor general deportment.⁷⁷ The concept of dignity in the right-to-die movement is laden with strong normative content. It is

⁷⁴ See generally Lois Shepherd, *Sophie’s Choices: Medical and Legal Responses to Suffering*, 72 NOTRE DAME L. REV. 103 (1996) (discussing the role of suffering in present-day responses to requests for legalized assisted suicide).

⁷⁵ OXFORD ENGLISH DICTIONARY 656 (2d ed. 1989).

⁷⁶ See Compassion in Dying, 79 F.3d at 812 (“The now recognized right to refuse or terminate treatment and the emergent right to receive medical assistance in hastening one’s death are inevitable consequences of changes in the causes of death, advances in medical science, and the development of new technologies. Both the need and the capacity to assist individuals to end their lives in peace and dignity have increased exponentially.”) (citations omitted). But see Ezekiel Emanuel, *Whose Right to Die?* ATLANTIC MONTHLY, Mar. 1997, at 73, 75 (referring to the statement quoted above as a “myth”).

⁷⁷ See Philosophers’ Brief, *supra* note 2, at 7 (explaining that the patient-plaintiffs in *Washington v. Glucksberg* and *Vacco v. Quill*: “want to end their lives when they think that living on, in the only way they can, would disfigure rather than enhance the lives they had created. Some people make the latter choice not just to escape pain. Even if it were possible to eliminate all pain for a dying patient—and frequently that is not possible—that would not

powerfully attractive. To the extent that dignity embodies a notion of what is worthy, noble, and honorable, almost no one would choose a life, or death, describable by terms meaning the opposite of dignity.

The death with dignity refrain embodies two notions: one, that an individual must have the option to have a dignified *method of death*, and two, that an individual must not *be forced to continue living* without dignity. Both of these concerns influenced the Ninth Circuit's decision to invalidate Washington's ban on physician-assisted suicide.⁷⁸ With respect to the first concern, the method of death, the Court discussed evidence offered at trial of people who wished to "die with dignity" having to resort to "gruesome alternatives"⁷⁹ because physician assistance was unavailable. One man, "deprived of the chance to die in a dignified manner with his loved ones by his side,"⁸⁰ shot himself to death, leaving his relatives to clean his "splattered brains off the basement walls."⁸¹ Another patient wished for "the dignity of dying in her own bed, surrounded by the things she loved."⁸² Dying in a protracted, drug-induced stupor from medication prescribed to ease intolerable pain, or dying by self-induced suffocation, or jumping off of a bridge are examples of the undignified deaths chosen by desperate patients "deprived of physician assistance."⁸³

Regarding the second notion of dignity in the "death with dignity" context, that of dignity in *living*, the Ninth Circuit focused on the lack of dignity experienced by many individuals who are terminally ill. The Court explicitly recognized that the failing quality of life of the individual takes away his dignity:

A competent terminally ill adult, having lived nearly the full measure of his life, has a strong liberty interest in choosing a dignified and humane death rather than being reduced at the end of his existence to a childlike state of helplessness, diapered, sedated, incontinent. How a person dies not only determines the nature of the final period of his existence, but in many cases, the enduring memories held by those who love him.⁸⁴

To illustrate the point, the Court related the testimony of one woman who explained how her father, "to whom dignity was very important, lay

end or even much alleviate the anguish some would feel at remaining alive, but intubated, helpless, and often sedated near oblivion.").

⁷⁸ See *Compassion in Dying*, 79 F.3d at 834-35.

⁷⁹ *Id.* at 834.

⁸⁰ *Id.*

⁸¹ *Id.* at 835.

⁸² *Id.*

⁸³ *Id.* at 834.

⁸⁴ *Id.* at 814.

dying diapered, moaning in pain, begging to die.”⁸⁵ The Court stated that for such people, “the decision to commit suicide is not senseless, and death does not come too early.”⁸⁶

A Michigan state court, in another decision that was ultimately reversed, went even further in its willingness to recognize content-based meaning in the term “dignity” and even in the term “autonomy.” The Michigan court in *Michigan v. Kevorkian* held that criminalizing physician-assisted suicide was unconstitutional because it violated a person’s right to commit “rational” suicide.⁸⁷ The opinion noted that “many, if not most” physicians (like the defendant) “accept the fact that under specifically defined conditions the alternative to life serves the best interest of the patient, the surviving family, and society,” and that these physicians accept this fact based on “contemporary attitudes about *personal dignity and autonomy*, the quality of life, happiness, and the meaning of life.”⁸⁸ Let’s overlook *the others* referred to in the court’s statement—“the surviving family, and society”—because it is certainly far from clear how *their* best interests should come into play in defining the liberty interests of the individual. That concern aside, the court’s statement in *Kevorkian* indicates that physicians accept that the best interests of the patient may be the “alternative to life” (*i.e.*, death), because the patient no longer enjoys dignity and autonomy in life. In this context, the terms dignity and autonomy do not refer to the freedom to make choices (*e.g.* whether to live or to hasten death). Rather, the terms refer to contemporary attitudes of how one should live an independent life.⁸⁹

⁸⁵ *Id.* at 835.

⁸⁶ *Id.* at 821.

⁸⁷ *Michigan v. Kevorkian*, No. 93-11482, WL 603212, at *18 (Mich. Cir. Ct. Dec. 13, 1993), *rev'd*, 527 N.W.2d 714 (Mich. 1994). The Court found “that when a person’s quality of life is significantly impaired by a medical condition and the medical condition is extremely unlikely to improve, and that person’s decision to commit suicide is a reasonable response to the condition causing the quality of life to be significantly impaired, and the decision to end one’s life is freely made without undue influence, such a person has a constitutionally protected right to commit suicide.” *Id.* at *19.

⁸⁸ *Id.* (emphasis added).

⁸⁹ This statement of the Michigan state court may indeed be true, insofar as it tells us what physicians accept. Timothy Quill (one of the plaintiff-physicians in *Quill v. Vacco*), in his famous letter to the *New England Journal of Medicine* in 1991, describes the case of Diane, a patient of his for whom he prescribed a lethal dose of barbiturates. Timothy E. Quill, *Death and Dignity: A Case of Individualized Decision Making*, 324 *NEW ENG. J. MED.* 691, 691-94 (1991). It is clear from his letter that he is very much attuned to her felt need to remain independent of others (autonomous) in life, and not to succumb to a life of dependency in the final stages of terminal leukemia. In prescribing the barbiturates, one may well ask whether Quill was respecting her freedom to make *this choice*, or whether he was instead promoting an understanding of Diane, both to herself and others, as independent. Quill describes his initial response to her request: “Knowing of her desire for independence and her decision to stay in control, I thought this request made perfect sense.” *Id.* at 693. See generally Patricia Wesley, *Dying Safely*, 8 *Issues in L. & Med.* 467 (1993) (critiquing Quill’s text and arguing that according to his own account Quill was a “powerful actor” in Diane’s story, injecting his own

Using this line of reasoning, it is possible, indeed appropriate, to judge decisions about whether to choose life or death based upon whether those decisions promote normatively based notions of autonomy as well as dignity. Identifying "choices central to personal dignity and autonomy," then, does not mean that we leave those choices to the individual because we respect her ability and the importance to her self-determination to make them. Instead, we protect choices that, properly made, promote dignity (proper conduct and appearance) and autonomy (independent living). If this is the theoretical underpinning to finding a liberty interest in committing rational suicide, then that liberty interest would be in having *certain* avenues open (*i.e.*, rational, physician-assisted suicide) rather than in having *all* avenues open (*i.e.*, life without dignity). This is about outcomes, not process. The choices made by an individual would be subject to our scrutiny and approval or disapproval as conforming to an expectation about dignified behavior.

Autonomy is not typically so mangled in right-to-die advocacy, although this is standard fare for dignity. The confusion is not limited to lower courts and liberal circuits. Conflicting views of the term dignity are also apparent (and similarly unacknowledged) in *Cruzan v. Missouri Department of Health*,⁹⁰ the other Supreme Court case (besides *Casey*) that the Ninth Circuit relied upon to determine that there was a constitutionally protected right to die.⁹¹ *Cruzan*, the Supreme Court later insisted in *Glucksberg*, was about unwanted medical treatment and the common law of battery, not about a right to die; and the right to withdraw unwanted medical treatment that was assumed (not announced) by the Court in *Cruzan* "was not simply deduced from abstract concepts of personal autonomy" (or dignity, the Court might have added).⁹² The Supreme Court Justices, however, were interested in dignity and autonomy in *Cruzan*, even though they did not then, and still have not, shown an awareness of the different ways in which the term dignity is used.

In her concurrence, Justice O'Connor insisted that a competent individual has a right to refuse unwanted artificial feeding and hydration just as she might refuse other forms of forced medical treatment.⁹³ "Requiring a competent adult to endure such procedures against her will,"

values into her medical decisions). Justice Stevens, in his concurrence in *Glucksberg* and *Quill* cites Dr. Quill's letter for the proposition that in some circumstances assisting in a patient's suicide would not harm the physician-patient relationship. *Glucksberg*, 117 S. Ct. at 2309.

⁹⁰ 497 U.S. 261 (1990) (holding that the Constitution permits a state to require clear and convincing evidence of an incompetent individual's wishes with respect to withholding nutrition and hydration).

⁹¹ See *Compassion in Dying*, 79 F.3d at 814-16.

⁹² *Glucksberg*, 117 S. Ct. at 2270.

⁹³ See *Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring).

O'Connor wrote, "burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment."⁹⁴ By linking dignity with freedom in decision-making and presupposing that it requires competency, O'Connor uses the understanding of dignity that we find in the abortion cases, dignity as autonomy.

A few pages later, Justice Brennan's dissent used the more restrictive, content-laden definition of dignity. Brennan argued that Nancy Cruzan deserved to "die with dignity."⁹⁵ (Of course, what Brennan really meant was that Nancy Cruzan should not have to live without dignity; she was not terminally ill, but in a persistent vegetative state that could have continued for years.) While on the one hand Brennan recognized that decisions about life-prolonging medical procedures are personal,⁹⁶ he was clearly not referring to dignity merely in the sense of respecting choices. He noted that "[f]or many, the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity intact, is a matter of extreme consequence."⁹⁷

It is no wonder, then, with this kind of imprecision, that advocates for a "proud death" have been able to tap into the rich language of abortion decisions referring to choices central to personal dignity and autonomy, even though *choice-making* in and of itself is not the act that defines dignity for such advocates in the right-to-die context.⁹⁸ Rather, it is the *actual choice made* and the effect that choice will have on the individual that is central to dignity in the death with dignity movement. The assisted suicide advocates do not ignore the ability to choose—because choosing is still central to *autonomy*, and both dignity and autonomy are appealed to—but dignity and autonomy are not embracing the same value, and may in fact be at odds with one another.

⁹⁴ *Id.*

⁹⁵ *Id.* at 302 (Brennan, J., dissenting).

⁹⁶ *See id.* at 311.

⁹⁷ *Id.* at 310-11. To illustrate his point, Brennan quoted from *Brophy v. New England Sinai Hospital Inc.*, 497 N.E. 2d 626, 635 (Mass. 1986), where the court found that the patient was "in a condition which [he] indicated he would consider to be degrading and without human dignity" and also that "[t]he duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity." *Cruzan*, 497 U.S. at 310 (Brennan, J., dissenting).

⁹⁸ The Ninth Circuit's opinion in *Compassion in Dying v. Washington* adroitly switches between an autonomy-based notion of dignity and a normatively based notion of dignity. Its statement quoted above (*see supra* text accompanying note 84), about a person's liberty interest in choosing a "dignified and human death rather than being reduced at the end of his existence to a childlike state of helplessness, diapered, sedated, incontinent," 79 F.3d at 814, follows immediately in the opinion on the heels of another reference to the *Casey* quote about "a choice central to personal dignity and autonomy." *Id.*

B. AUTONOMY AND DIGNITY IN CONFLICT

If dignity refers to the way one lives as a sick or dying patient—the extent to which one retains dignity during the trials of illness and decline—and also to the way one dies—i.e., quietly, peacefully, as a competent individual rather than sedated and incompetent or violently through a “makeshift” suicide—then dignity does not refer simply to autonomy. Instead, dignity refers to a specific valuation of the quality of one human being’s existence and his dying process. Thus, respecting someone’s dignity in the “death with dignity” context presupposes making a value judgment about an individual’s quality of life, while respecting that same person’s autonomy would require us to avoid making such value judgments.

The well-known case of Elizabeth Bouvia⁹⁹ illustrates the conflict between respecting an individual’s dignity and respecting her autonomy. Bouvia, a woman who was not terminally ill but who suffered from cerebral palsy, quadriplegia, and arthritis, brought suit in the early 1980s to have the nasogastric tube that provided her with nutrition and hydration removed.¹⁰⁰ She had been placed in a hospital not because she required the sophisticated medical care that only a hospital could provide, but because she lacked a home and a caregiver.¹⁰¹ The court held that Bouvia had a right to have the tube withdrawn just as she could refuse any medical treatment.¹⁰² The decision, therefore, appears grounded in recognition of Bouvia’s autonomy. But the California court went to great lengths to confirm that Bouvia was making a rational decision in choosing to end her life. According to the court, Bouvia’s life “ha[d] been diminished to the point of hopelessness, uselessness, unenjoyability and frustration,”¹⁰³ and she was “imprisoned and [had to] lie physically helpless, subject to the ignominy, embarrassment, humiliation and dehu-

⁹⁹ *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986).

¹⁰⁰ *See id.* at 298.

¹⁰¹ *See* Paul K. Longmore, *Elizabeth Bouvia, Assisted Suicide and Social Prejudice*, 3 *ISSUES L. & MED.* 141, 152-57 (describing Bouvia’s life-long encounters with prejudice and the personal emotional upheavals that preceded her petition for removal of her feeding tube, which included a miscarriage and separation from her husband).

¹⁰² *Bouvia*, 225 Cal. Rptr. at 300-04. The court writes:

Here Elizabeth Bouvia’s decision to forego medical treatment or life support through a mechanical means belongs to her. It is not a medical decision for her physicians to make. Neither is it a legal question whose soundness is to be resolved by lawyers or judges. It is not a conditional right subject to approval by ethics committees or courts of law. It is a moral and philosophical decision that, being a competent adult, is hers alone.

Id. at 305. Bouvia later decided not to have her feeding tube removed even though she had won the court’s approval to do so. According to newspaper accounts, she “changed her plans almost immediately, when she realized that it would take several painful weeks for her to die.” *10 Years After Winning Right to Die, Patient Lives*, *ORLANDO SENTINEL*, Dec. 17, 1993, at A5.

¹⁰³ *Bouvia*, 225 Cal. Rptr. at 304.

manizing aspects created by her helplessness.”¹⁰⁴ The court stated that it could not fault her for considering her existence meaningless.¹⁰⁵

Was it Bouvia’s autonomy or dignity that required the removal of her feeding tube? If respect for Bouvia’s autonomy drove the court’s opinion, then why did it discuss her undignified state? Respecting her autonomy would require letting Bouvia make her *own* judgments about “the meaning of existence” without the court agreeing that her existence might be meaningless.

The court respected Bouvia’s autonomy only because it agreed with her assessment of her dignity. If the court believed that Bouvia’s condition was *not* undignified, then respecting her autonomy (which might require us to remove the feeding tube, at her request) would not require the same action as respecting her dignity (which might require instead that the court convey the message that her life is worth living and, perhaps, that our society must better provide for people in her condition). On the other hand, if the court considered Bouvia’s condition undignified but she did not wish to end her life, then respect for her dignity (which might cause us to persuade her, in countless subtle and indirect ways to end her life) would not require the same response as respect for her autonomy (which would appear to prohibit any such suggestions).

The potential conflict between the two concepts is highlighted further if we consider that insistence on either value would be at the expense of the other. First, consider what insisting on autonomy does to dignity. It is easy to see that a person may have autonomy and yet lack dignity in the normative sense. Certainly, one can have the capacity for autonomous action and exercise autonomy in ways that are undignified. To take an example outside of the emotionally charged context surrounding the end of life, a person might knowingly and deliberately choose to grovel, yet groveling is considered unseemly or undignified. Thus, just because a person has both the capacity for autonomy and the liberty to exercise it does not mean that she will choose to act with dignity. Insisting on autonomy, then, may lead to undignified conduct.

Second, and more troubling, *insisting on dignity*, whether in the context of mundane issues such as table manners or extremely important issues at the end of life, *impinges on autonomy* because it restricts the choice to be undignified. For individuals considered to lack dignity in life, insisting upon dignity may, in the extreme, eliminate the choice of life. This is what appears to have happened to Brianne Rideout, a terminally ill three-year-old child who lapsed into a coma after she had been

¹⁰⁴ *Id.* at 305.

¹⁰⁵ *See id.* at 304.

placed on a ventilator.¹⁰⁶ It makes little or no sense to speak of her autonomy, but the parents of ill children are usually considered to possess the authority to make medical decisions on their children's behalf. Over the parents' protests, Brianne's physicians removed her from the ventilator, and she died. To justify this unilateral action, the chief operating officer of the hospital described the physicians' actions as an effort "to continue to preserve the dignity of the child."¹⁰⁷

One might argue that the physicians' withdrawal of treatment for Brianne Rideout over the protest of her parents, which many (rightly) have found outrageous, is not illustrative of the conflict between autonomy and dignity because it makes no sense to speak of Brianne's autonomy. Furthermore, the argument continues, if a patient *were* competent, insistence on dignity would not require the withdrawal of treatment because competency itself reveals a dignity in life that we would respect. But it is certainly not clear that this is so. People who are willing to make normative judgments about the dignity of dying persons would be apt to say that someone completely lacking in autonomous powers lacks dignity. They do not, however, insist on a lack of autonomous powers before deciding that a life is undignified. Indeed, almost the opposite is the case: both the Oregon legislation permitting physician-assisted suicide¹⁰⁸ and the appellate decisions recognizing a constitutional right to physician-assisted suicide¹⁰⁹ insist that a person be *competent* before she avails herself of physician assistance to end or avoid an undignified life. Without such provisions respecting autonomy, insisting on dignity would require withdrawing treatment without consent.

Of course it is true that we do not have to insist upon either dignity or autonomy to the exclusion of the other. But considering both concepts would require *balancing* the two, and balancing two distinct and disparate values is certainly different than thinking about the relationship between dignity and autonomy as harmoniously linked. Balancing does not imply that both values are fully expressed; quite the opposite, it suggests that one or both must be compromised. Until we recognize that dignity conditioned on behavior (or health, appearance, status, condition, mobility, continence) and autonomy are at odds with each other, we will not begin to discover what trade-offs between the two may be appropriate.

The easy and uncritical use of the phrase "dignity and autonomy" in the context of right to die advocacy avoids our necessary discovery of the

¹⁰⁶ See Frank Bruni, *A Fight Over Baby's Dignity and Death*, N.Y. TIMES, Mar. 9, 1996, at 6.

¹⁰⁷ *Id.*

¹⁰⁸ See OR. REV. STAT. § 127.800-897 (Supp. 1996) (The Oregon Death with Dignity Act).

¹⁰⁹ See, e.g., *Compassion in Dying*, 79 F.3d 790.

appropriate relationship between the two concepts. It has also made it difficult to discuss what we mean, or what we want to mean, when we talk about dignity in a sense that is constitutionally relevant. Cases that establish the rights of criminal defendants talk about an entirely different kind of dignity. In one set of cases, those concerning the right to self-representation, dignity and autonomy are linked as the foundation for the constitutional rights therein recognized. While linking dignity and autonomy in those cases dilutes the potential good of such a broad understanding of dignity, the cases nevertheless provide another line of precedent, though imperfect, to which we might turn to understand the relationship between dignity and rights.

III. UNCONDITIONAL DIGNITY

A. A DIGNITY FOR ALL

The broadest understanding of dignity equates it with the intrinsic worth of all human beings. In speaking about human dignity, philosophers recognize that the ability to reason about moral problems and then to make moral decisions or take moral action sets humans apart from other animals. In Kantian theory, this distinctly human ability is understood in terms of the “rational will.”¹¹⁰ Because humans are creatures with the capacity for a rational will, they have the moral status of “dignity.”¹¹¹ Kant’s moral theory is grounded in the idea that the dignity of human beings as rational creatures must be respected and protected; individuals must be treated as persons, not objects, as ends in themselves and not as means to other ends.¹¹²

This unconditional understanding of human dignity requires only humanness. Even a person who acts immorally is due respect as a human being.¹¹³ We may not like her or find her useful, desire her company, or think her moral, but the individual possesses dignity,¹¹⁴ now and forever. Dignity cannot be lost, given up, or taken away. We may talk about offenses against the dignity of a person, or “indignities” that a per-

¹¹⁰ According to R.S. Downie and Elizabeth Telfer, “to have a rational will is to be capable not simply of thinking rationally but also of acting rationally.” R. S. DOWNIE & ELIZABETH TELFER, *RESPECT FOR PERSONS* 20 (1970). This involves (1) “the ability to choose for oneself, and, more extensively, to formulate purposes, plans and policies of one’s own,” (2) “the ability to carry out decisions, plans or policies without undue reliance on the help of others” (these two abilities constitute self-determination), and (3) “the ability to govern one’s conduct by rules” and “to adopt rules which one holds to be binding on oneself and all rational beings.” *Id.* at 20-21.

¹¹¹ *METAPHYSICS OF MORALS*, *supra* note 53, at 60-61; MURPHY & COLEMAN, *supra* note 53, at 82.

¹¹² *See METAPHYSICS OF MORALS*, *supra* note 53, at 52; MURPHY & COLEMAN, *supra* note 53, at 83.

¹¹³ *See HILL*, *supra* note 30, at 179.

¹¹⁴ *See id.* at 202.

son may suffer, but such offenses or indignities do not cause a person to lose dignity; rather, they show an improper lack of respect on the part of the offender for the dignity of another human being.

While dignity refers to an intrinsic quality that is not lost or compromised by bad acts or gained by good acts, it is not clear whether, in the Kantian tradition, an individual must be minimally rational in order to have dignity.¹¹⁵ Our jurisprudence reflects this same ambiguity. The abortion rights cases, as we have seen, assume an understanding of dignity that requires an individual to be able to make choices, to act autonomously. But the dignity that defines the rights of criminal suspects, defendants and prisoners is not dependent on any degree of rationality.¹¹⁶ It embraces all people.

B. THE DIGNITY OF CRIMINALS

The Supreme Court has identified the "dignity of man" as the basic concept underlying the Eighth Amendment's prohibition against inflicting cruel and unusual punishment.¹¹⁷ Justice Brennan's concurrence in *Furman v. Georgia*¹¹⁸ explicitly linked the dignity protected by the

¹¹⁵ See *METAPHYSICS OF MORALS*, *supra* note 53, at 52-66; Goodin, *supra* note 54, at 95.

¹¹⁶ This broad sense of human dignity is also apparent in cases concerning discrimination based on race, gender, or other suspect characteristics. The dignity that all human beings share requires that they be accorded equal respect. Denying equal access to public establishments results in the "deprivation of personal dignity." *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 250 (1964) (permanently enjoining motel from refusing to provide rooms to people on the basis of race). In his concurring opinion, Justice Goldberg quoted the Senate Commerce Committee: "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color." *Id.* at 292. Racial discrimination in the qualification or selection of jurors likewise "offends the dignity of persons and the integrity of the courts." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628 (1991) (explaining also that "classifications based on ancestry or skin color" are not consistent with "respect for the dignity of persons," *Id.* at 631). In the workplace, individuals discriminated against are deprived not only of their property rights, but also of their right to respect for their dignity. See *United States v. Burke*, 504 U.S. 229, 246 (1992) (Souter, J., concurring) (stating that Title VII "vindicates an interest in dignity as a human being entitled to be judged on individual merit"); *Weeks v. Baker & McKenzie*, 66 FEP Cases (BNA) 581, 582 (Cal. Super. Ct. 1994) (stating that "[s]exual harassment strips the victim of dignity and self-respect. Such harassment is degrading and dehumanizing."); see generally Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996) (discussing the difference between the property rights and dignity rights implicated in employment discrimination cases).

¹¹⁷ See *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (the requirement that a penalty must accord with the "dignity of man" "means, at least, that the punishment not be 'excessive,'" meaning it must not involve the unnecessary and wanton infliction of pain or be grossly disproportionate to the severity of the crime). The Supreme Court in *Gregg* held that the death penalty is not a form of punishment that may never be imposed. *Id.* at 187.

¹¹⁸ 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (arguing that the death penalty constitutes cruel and unusual punishment).

Eighth Amendment to the *intrinsic* (unconditional) worth of human beings:

The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual' therefore, if it does not comport with human dignity. . . . The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings.¹¹⁹

Cruel and unusual punishments disregard the fundamental premise of the Eighth Amendment—that “even the vilest criminal remains a human being possessed of common human dignity.”¹²⁰ In *Furman*, Justice Brennan noted that it is “[m]ore than the presence of pain” that makes severe punishment “degrading to the dignity of human beings.”¹²¹ It is the fact that these punishments “treat members of the human race as nonhumans, as objects to be toyed with and discarded.”¹²² For this reason, expatriation, which is not physically painful, may be a form of cruel and unusual punishment¹²³ because “it necessarily involves a denial by society of the individual’s existence as a member of the human community.”¹²⁴ The infliction of severe pain, execution, and expatriation may each fail to respect the human dignity that every person, even a despised criminal, possesses because they treat the criminal as an object rather than as a person.

The Court has also used dignity to ground the Fifth Amendment’s guarantee against self-incrimination. In *Miranda v. Arizona*, the Court noted that “the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must

¹¹⁹ *Id.* at 270-71; *see also id.* at 296 (describing our society as one “for which the dignity of the individual is the supreme value”).

¹²⁰ *Id.* at 273.

¹²¹ *Id.* at 272.

¹²² *Id.*

¹²³ *See Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹²⁴ *Furman*, 408 U.S. at 273-74. In describing the pain of expatriation, Brennan quotes from *Trop v. Dulles*:

There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself.

Furman, 408 U.S. at 274 n.15 (quoting *Trop v. Dulles*, 356 U.S. at 101-102); *see also* *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.) (Death penalty process that failed to assess propriety in each individual case “treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”).

accord to the dignity and integrity of its citizens.”¹²⁵ The state must produce evidence against an accused individual by its own independent labors and not resort to the “cruel, simple expedient of compelling it from [the accused’s] own mouth.”¹²⁶ Guilt or innocence is of less consequence than our respect; the concern is that such a “cruel, simple expedient” will violate dignity to such an extent that a guilty verdict will reflect worse on us than it does on the accused.¹²⁷

Intrusive searches of the body, such as body cavity searches of inmates after visitation,¹²⁸ or the withdrawal of blood samples for intoxication tests,¹²⁹ or urinalysis collection to test for illegal drugs,¹³⁰ also risk violating an individual’s dignity. While the Court has generally upheld such practices, it has nevertheless recognized that the Fourth Amendment protects “[t]he interests in human dignity and privacy . . . [which] forbid any . . . intrusions [beyond the body’s surface] on the mere chance that desired evidence might be obtained.”¹³¹ The dissenting voices in these types of cases express more vocally the offense to dignity implicated by such practices. In *Bell v. Wolfish*, upholding various prison search practices, including body cavity searches conducted after visitation, Justice Marshall argued in dissent that “body-cavity searches of . . . inmates represent one of the most grievous offenses against personal dignity and common decency.”¹³² The practice “placed inmates in the most degrading position possible.”¹³³ The process was even more “humiliating” because correctional officers often conducted the searches while other inmates were present.¹³⁴ Justice Stevens, also in dissent, found the body search practice, as well as other prison rules at issue, as “either unneces-

¹²⁵ 384 U.S. 436, 460 (1966).

¹²⁶ *Id.*

¹²⁷ See *id.* at 447 (quoting the Wickersham Commission Report: “To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): ‘It is not admissible to do a great right by doing a little wrong. . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means.’”).

¹²⁸ See *Bell v. Wolfish*, 441 U.S. 520 (1979) (holding body cavity searches conducted after visitation not unconstitutional).

¹²⁹ See *Schmerber v. California*, 384 U.S. 757 (1966) (upholding blood sample test for intoxication).

¹³⁰ See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (holding U.S. Customs Service’s drug screening program for employees was a reasonable search within the meaning of the Fourth Amendment); *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989) (holding urinalysis and blood testing to detect drugs or alcohol in railroad employees was reasonable and therefore constitutional).

¹³¹ *Schmerber*, 384 U.S. at 769-70. Despite the Fourth Amendment’s protection against unreasonable searches, in *Schmerber*, “the delay necessary to obtain a warrant, under the circumstances, threatened the ‘destruction of evidence,’” and so the search was held to be reasonable. *Id.* at 770.

¹³² 441 U.S. at 576-77 (Marshall, J., dissenting).

¹³³ *Id.* at 577.

¹³⁴ *Id.*

sary or excessively harmful, particularly when judged against our historic respect for the dignity of the free citizen.”¹³⁵ To Stevens, the body cavity search was “clearly the greatest personal indignity.”¹³⁶ In these cases, it is not the conduct or appearance of the prisoner that offends our sense of universal dignity; it is the state’s transgression of respect.

C. RESPECTING AUTONOMY AS A PART OF RESPECTING DIGNITY

The unconditional definition of dignity, as opposed to the dignity discussed in the abortion context, is not the same as autonomy. Nor, as in the right to die context, is this third type of dignity somewhat the opposite of autonomy. Instead, respecting an individual’s autonomy is only a part of what respect for her dignity requires. Recall that the dignity of human beings is, for many thinkers, based on the ability of the species in general to reason about moral problems and to take moral action. Even if rationality is not required of every individual in order to say that she possesses dignity, the ability to self-govern, to act autonomously, is clearly valued. But while respecting the dignity of an individual requires that we respect her autonomy, it also requires more since there are other aspects to being human besides rationality. Unconditional dignity requires a number of responses from us to the individual; only a subset of those responses stems from our respect for the autonomy of rational individuals.

¹³⁵ 441 U.S. at 595 (Stevens, J., dissenting).

¹³⁶ *Id.* at 594; see also *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680 (1988) (Scalia, J., dissenting) (urinalysis testing, whereby the Customs Service “can demand that employees perform ‘an excretory function traditionally shielded by great privacy,’” (quoting *Skinner v. Railway Labor Executives’ Ass’n.*, 489 U.S. 602, 626 (1988)) and can require that the excretion “be turned over to the Government for chemical analysis,” is “a type of search particularly destructive of privacy and offensive to personal dignity”); *Skinner*, 489 U.S. at 646 (Marshall, J., dissenting). In *Skinner*, Justice Marshall argued that privacy was violated by the urine testing practice of the Federal Railroad Administration because the Field Manual directed the supervisors who were collecting the samples to observe the railroad workers as they provided the samples to make sure the samples were not being diluted. *Id.* To further his point, Justice Marshall quoted Professor (and later Solicitor General) Charles Fried: “[I]n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one’s dignity and self esteem.” *Id.* (quoting Charles Fried, *Privacy*, 77 *YALE L. J.* 475, 487 (1968)).

Not all Justices have always used the term dignity to embrace a broad concept of intrinsic human worth to analyze the rights of criminal defendants or prisoners. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 684-85 (1986) (White, J., dissenting) (distinguishing punishment that is merely an affront to dignity because it is degrading, and punishment that violates more than dignity because it is barbaric or inhumane); see also *Miranda v. Arizona*, 384 U.S. 436, 542 (1965) (White, J., dissenting) (arguing that the *Miranda* rule will return “a killer, a rapist, or other criminal to the streets,” thereby causing “not a gain, but a loss, in human dignity,” because citizens will resort to “violent self-help with guns, knives and the help of their neighbors similarly inclined.”).

Although casual references to “dignity and autonomy,” as if the two words mean the same thing or point to the same result, may be imprecise, such references are not overly problematic when dignity is understood in the unconditional sense. Consequently, it is not surprising when one area of criminal law looks repeatedly to dignity and autonomy *in combination* as the basis for rights. The Supreme Court, and lower courts following its lead, have used the phrase “dignity and autonomy” in describing the right of defendants to proceed *pro se* in a criminal trial.¹³⁷ In this area of criminal defense rights, what does adding autonomy to the traditional bulwark of dignity do to qualify or enhance dignity? In contrast with the criminal cases that limit the state’s power to punish or engage in intrusive searches, autonomy is clearly involved when consequential choices must be made. The defendant has the right to exercise control over his defense—to make decisions, to speak for himself, to act independently.¹³⁸ Thus, it makes sense to speak about autonomy in this context. At the same time, autonomy does not eclipse dignity. Dignity requires more than merely letting the defendant make choices, speak, or act independently; it requires that as the defendant is doing these things, and perhaps doing them badly, we respect him as a person.

Although the *pro se* cases have not adequately unpacked the meaning of “dignity and autonomy” to which they repeatedly refer, and have not explicitly recognized the distinct meanings of dignity and autonomy, they have not entirely ignored these issues either. As a result, these cases are a useful vehicle for examining the relationship between unconditional dignity and autonomy. The *pro se* cases, like other cases concerning the rights of criminal defendants, use the unconditional definition of dignity. Consequently, even though these self-representation cases reflexively couple dignity with autonomy, dignity still matters.

D. DIGNITY AND AUTONOMY IN SELF-REPRESENTATION CASES

In the 1984 case of *McKaskle v. Wiggins*,¹³⁹ the Supreme Court noted that “the right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at

¹³⁷ See *McKaskle v. Wiggins*, 465 U.S. 168, 176-77, 178 (1984); *Jones v. Barnes*, 463 U.S. 745, 759 (1983) (Brennan & Marshall, JJ., dissenting); *United States v. McDermott*, 64 F.3d 1448, 1454 (10th Cir. 1995); *Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995); *United States v. Mills*, 895 F.2d 897, 902 (2d Cir. 1990); *Oses v. Massachusetts*, 775 F. Supp. 443, 456 (D. Mass. 1991), *aff’d*, 961 F.2d 985 (1st Cir. 1992), *cert. denied*, 506 U.S. 954 (1992); *People v. Nauton*, 34 Cal. Rptr. 2d 861, 863 (Cal. App. 1994); *Snowden v. State*, 672 A.2d 1017, 1021 (Del. Super. Ct. 1996); *In re Adoption of J.S.P.L.*, 532 N.W.2d 653, 661 (N.D. 1995).

¹³⁸ See generally *McKaskle*, 465 U.S. 168; *Faretta v. California*, 422 U.S. 806 (1975).

¹³⁹ 465 U.S. 168 (1984).

least occasionally, be the accused's best possible defense."¹⁴⁰ The defendant's right to proceed *pro se* derives from the Sixth Amendment and was first recognized in *Faretta v. California*.¹⁴¹ While *Faretta* recognized the defendant's right to self-representation, which "must be honored out of 'that respect for the individual which is the lifeblood of the law,'"¹⁴² it also permitted courts to appoint "standby counsel" to aid the defendant in technical matters to keep the trial running smoothly.¹⁴³ *McKaskle* used a two-part test to decide when a standby counsel goes too far, interfering with a defendant's *pro se* right. First, the defendant must be allowed to preserve *actual control* over his own case. According to *McKaskle*, "[t]his is the core of the *Faretta* right."¹⁴⁴ Second, the standby counsel's participation in the trial "should not be allowed to destroy the jury's *perception* that the defendant is representing himself."¹⁴⁵

The first part of the test established by the Court, the defendant's right to preserve actual control over his case, most clearly respects the defendant's autonomy.¹⁴⁶ This concern for the defendant's autonomy is grounded in the broader notion of dignity that has been recognized for criminal defendants generally; the imposition of lawyers should not be one of the punishments or indignities that a person receives for being accused of a crime.¹⁴⁷

Autonomy also supports the second prong of the *McKaskle* test, whether participation by standby counsel has destroyed the jury's *perception* that the defendant is representing himself. Respect for an individual's autonomy may require this test because the defendant should retain command over decisions that may affect the jury's perception of him. The defendant therefore should retain the ability to decide whether he would fare better with the jury through self-representation, relying as

¹⁴⁰ 465 U.S. 168, 176-77 (1984). Later, the Court wrote: "The defendant's appearance in the status of one conducting his own defense is important in a criminal trial since the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy." *Id.* at 178.

¹⁴¹ 422 U.S. 806 (1975).

¹⁴² *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-351 (Brennan, J., concurring)).

¹⁴³ *Id.* at 834-36 n.46.

¹⁴⁴ 465 U.S. at 178.

¹⁴⁵ *Id.* (emphasis added).

¹⁴⁶ The Court wrote, "If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded." *Id.*; see also *Faretta*, 422 U.S. at 833-34 (allowing the defendant to choose self-representation is in keeping with framers' belief in "the inestimable worth of free choice").

¹⁴⁷ See *Jones v. Barnes*, 463 U.S. 745, 764 (1983) (Brennan, J., dissenting); see also *Faretta*, 422 U.S. at 834 ("To force a lawyer on a defendant can only lead him to believe that the law contrives against him.").

he might on the theory that “the message conveyed by the defense may depend as much on the messenger as on the message itself.”¹⁴⁸

But *McKaskle*'s second prong is also clearly about dignity. It proscribes certain behavior on the part of stand-by counsel that is not adequately respectful of the intrinsic human dignity of the defendant. “Appearing before the jury in the status of one who is defending himself may be equally important to the *pro se* defendant.”¹⁴⁹ In addition to the effect upon the jury, “[f]rom the defendant’s own point of view, the right to appear *pro se* can lose much of its importance if only the lawyers in the courtroom know that the right is being exercised.”¹⁵⁰

The appearance that the defendant is acting *pro se* is not just, in some rare instances, the defendant’s most effective defense (because of the messenger versus the message theory). According to the *McKaskle* Court, it is also tied up in “the dignitary values that the right to self-representation is intended to promote.”¹⁵¹ The Court appropriately draws support for recognition of these dignitary values from earlier cases holding that courts may not normally force a defendant to appear in court in shackles or prison garb.¹⁵² The issue is not whether *the defendant is acting with dignity*—that would be the conditional form of dignity we see in the “death with dignity” movement; rather it is the standby counsel’s conduct that triggers concern. More specifically, we ask whether *the standby counsel is respecting the defendant’s intrinsic dignity*. The essential issue is whether standby counsel is inappropriately disregarding the defendant’s decisions, opinions, preferences, or speech in front of the jury. The dignity referred to in these cases is an obligation of respect. It calls for treating others (defendants) as individuals worthy of respect,

¹⁴⁸ *McKaskle*, 465 U.S. at 179.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* A California appellate court may have summed up the *pro se* right most memorably when it wrote:

Respect for the dignity and autonomy of the individual is a value universally celebrated in free societies and uniformly repressed in totalitarian and authoritarian societies. Out of fidelity to that value defendant’s choice must be honored even if he opts foolishly to go to hell in a handbasket. At least, if the worst happens, he can descend to the netherworld with his head held high. It’s called, “Doing It My Way.”

People v. Nauton, 34 Cal. Rptr. 2d 861, 864 (1994).

¹⁵¹ *McKaskle*, 465 U.S. at 182.

¹⁵² See *id.* at 178 (citing *Estelle v. Williams*, 425 U.S. 501 (1976)). In *Estelle v. Williams*, the Supreme Court held that a state cannot, consistent with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in prison garb because of the possible impairment of the presumption of innocence. However, since the defendant did not object to the court, there was no constitutional violation. Dissenting Justices Brennan and Marshall objected to the court’s acceptance of the waiver of the defendant’s right, and offered some heightened language on the importance of this right: “Identifiable prison garb robs an accused of the respect and dignity accorded other participants in a trial and constitutionally due the accused as an element of the presumption of innocence, and surely tends to brand him in the eyes of the jurors with an unmistakable mark of guilt.” *Id.* at 518.

worthy of being heard, and not as objects maneuvered around the courtroom for the purposes of others.

CONCLUSION

The Supreme Court might have looked to the *pro se* cases for some answers to the questions posed in *Washington v. Glucksberg*. Rather than ignoring the repeated appeals to “dignity and autonomy,” and taking refuge in the past, the Court might have met the call to begin a new discussion of rights. *Glucksberg* could have engaged in an analysis of these two heavily invoked concepts, concepts that have too long been unquestionably conjoined in the abortion cases and too often misappropriated by the lower court right-to-die decisions. Dignity and autonomy are still only imperfectly paired in the *pro se* cases, but the connection those cases share with others that protect the rights of criminal suspects, defendants, and prisoners, suggests an understanding of dignity that holds promise for grounding rights.

This unconditional dignity applies to all human beings, and recognition of it can protect the wicked, the incompetent, the pregnant, the minor, the weak, the nearly dead, the barely breathing in ways that respecting autonomy or respecting dignified living and dying cannot. Even if there is no possibility of autonomous action—for example, an individual is incapable of autonomous action through physical limitations of her own or those imposed by outside conditions, such as imprisonment—this form of dignity can still be honored. Individuals who lack the capacity for autonomy still have dignity, but respecting their dignity does not require us to recognize meaningless rights to autonomy for them. If the defendant lacks the competency to waive her right to counsel, then we do not allow her to proceed *pro se*,¹⁵³ but while we cannot accord her rights to autonomy, we can still respect her dignity by providing vigorous representation, allowing her to appear in court without shackles and in regular clothing, protecting her from self-incrimination, and ensuring that she understands to the extent possible the processes against her. Likewise, when an individual is not living up to common standards of decency, or is considered, in normal parlance, undignified, she does not lose this inalienable, unconditional human dignity—we still give her the right to counsel, and permit her to waive that right.

In *Glucksberg*, the Supreme Court had the opportunity to begin serious consideration of what dignity and autonomy might each mean when separated from the other. More specifically, the Court might have embarked on a quest to determine what dignity, understood as the intrinsic

¹⁵³ See *Godinez v. Moran*, 509 U.S. 389 (1993) (holding that standard for waiving right to counsel is same as competency standard for standing trial).

worth of all human beings, requires in terms of constitutional interpretation. Casual and uncritical references to dignity and autonomy as the same value limit our thinking about the *other* human responses that respect for the intrinsic dignity of human beings should prompt, besides that of respecting their autonomy. Isaiah Berlin, for example, writes about our universal need for status and recognition, a desire for something other than liberty or autonomy, a desire "for union, closer understanding, integration of interests, a life of common dependence and common sacrifice."¹⁵⁴ What would an appreciation for intrinsic human dignity mean for the role of *compassion* in law? I have written above that the death with dignity movement is all—at least in rhetoric—about dignity (dignified behavior). Yet, as I have written elsewhere, our impulses here are to relieve suffering.¹⁵⁵ The Solicitor General suggested the same to the Court in *Glucksberg*.¹⁵⁶ Similarly, Justice O'Connor, in a concurring opinion joined by Justices Ginsberg and Breyer, took pains to make clear that terminally ill patients are permitted adequate pain medication even though large doses may have the unintended, but not unexpected, effect of hastening the patient's death.¹⁵⁷

Respecting the intrinsic human dignity of every person might require some response to their suffering, their pain, their need. That response may or may not come in the form of rights. In the context of

¹⁵⁴ Isaiah Berlin, *Two Concepts of Liberty*, in ISAAH BERLIN, *FOUR ESSAYS OF LIBERTY* 158 (1969). Berlin, contrasting the individual's need for status and recognition with the more traditional quest for autonomy, writes that:

What I may seek to avoid is simply being ignored, or patronized, or despised, or being taken too much for granted—in short, not being treated as an individual, having my uniqueness insufficiently recognized, being classed as a member of some featureless amalgam, a statistical unit without identifiable, specifically human features and purposes of my own. This is the degradation that I am fighting against—not equality of legal rights, nor liberty to do as I wish (although I may want these too), but for a condition in which I feel that I am, because I am taken to be, a responsible agent, whose will is taken into consideration because I am entitled to it, even if I am attacked and persecuted for being what I am or choosing as I do.

Id. at 155-56.

¹⁵⁵ See Shepherd, *supra* note 74.

¹⁵⁶ See Brief for the United States as Amicus Curiae Supporting Petitioners at 8, *Glucksberg*, 117 S. Ct. 2258 (No. 96-110) (arguing that "[a] competent, terminally ill adult has a constitutionally cognizable liberty interest in avoiding the kind of suffering experienced by the plaintiffs").

¹⁵⁷ See *Vacco v. Quill*, 117 S. Ct. 2302, 2303 (1997) (O'Connor, J., concurring) (because such palliative care is not prohibited in either Washington or New York, the Court did not have to consider "whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives."); see also *id.* at 2311-12 (Breyer, J., concurring) (agreeing with O'Connor that were the state to prohibit needed palliative care, a constitutionally cognizable liberty interest might be implicated). See generally Robert A. Burt, 337 *NEW ENG. J. MED.* 1234 (1997) (arguing that a court majority in *Glucksberg* found "that states must not impose barriers on the availability of palliative care for terminally ill patients").

disease and dying, it may not (and I think does not) require that we allow terminally ill patients to commit suicide with physician assistance. Respecting this form of dignity, however, might require that we learn more about alleviating pain (a subject about which we appear to know notoriously little), and that we provide medical care for people regardless of their ability to pay. In the abortion context, a respect for human dignity that makes us sensitive to the suffering of others might explain why we already look to the best interests of immature minors in permitting them to have abortions without parental consent.

A greater appreciation for the intrinsic dignity of all human beings might also force us to question more seriously existing incongruities in the way we handle issues of respect. Why, for example, should we not be required to treat women walking from their cars to abortion clinics in the exercise of their autonomous choices with at least the degree of respect we accord criminal defendants exercising their *pro se* rights in court—rather than letting them remain subject to repeated “jostling, grabbing, pushing, and shoving”¹⁵⁸ by anti-abortion protesters and leaving them vulnerable to be yelled at and spit upon?¹⁵⁹ Similarly, why do we devote the resources we do to ensure that a *pro se* criminal defendant is allowed to proceed in court “with his head held high,”¹⁶⁰ and yet at the same time show a too-ready willingness to consider the dependency of the sick and elderly to be undignified?

While dignity and autonomy were pushed too hard in the recent right-to-die litigation, and dignity especially has been misunderstood and mishandled, it is not too late to roll up our sleeves and begin working anew with these fundamental concepts.

¹⁵⁸ *Schenck v. Pro-Choice Network*, 117 S. Ct. 855, 866-67 (1997) (holding that floating buffer zones requiring protestors to stay fifteen feet from people and vehicles entering and leaving clinics violated the First Amendment).

¹⁵⁹ *See id.* at 860 (describing the past activities of the anti-abortion protestors subject to the district court injunction at issue in the case). Of course, the quick answer to this question is, “the First Amendment.” But it seems to me that we should, at the least, consider the dignity of the abortion clinic visitors in our analysis, instead of simply ignoring it.

¹⁶⁰ *People v. Nauton*, 34 Cal. Rptr. 2d 861, 864 (1994).