Technoindignification: Dignity, the Law, and Disability Technology

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I. INTRODUCTION

The world's infinite complexity creates interesting challenges for those attempting to bring order and coherence to our shared existence. Given the magnitude and sheer variation of life, establishing structure in a chaotic world demands rules that are at once specific and rigid enough to have effect and meaning, yet nebulous enough to fit a wide variety of scenarios. In the context of law and policy, failure to get the right balance can lead to absurd, frustrating, or unjust outcomes.[1]

This very tension is evident in the relationship between law and disability; as a result, how American society engages with the concept of

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1. *See e.g.* Alison Siegler, *End Mandatory Minimums*, BRENNAN CTR., (Oct. 18, 2021), https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums (discussing the rigidity of the sentencing apparatus).

disability is affected. Although the U.S. has made major strides regarding disability rights over the last few decades,[2] numerous challenges persist.

Technology is often proposed as a cure-all for the shortcomings of social supports for people with disabilities—a means to fill the gaps left by core disability laws like the Americans with Disabilities Act (ADA) and welfare programs such as Social Security, Medicare, and Medicaid. While certain technologies can be genuinely helpful tools for individuals with disabilities, a romanticization of technological progress and the insistence on implementing new technologies within outdated, ineffective frameworks can—and often does—obscure the legal insufficiency and the administrative violence[3] of the status quo. As technology may mask the shortcomings of the law, it is also true that existing laws can hinder capable technology from reaching its full potential. Recognizing a right to dignity may significantly help clarify the roles of technology and law in the lives of individuals with disabilities.

This Comment argues that dignity is a suitably robust yet sufficiently flexible mechanism to meaningfully address the administrative violence encountered by people with disabilities. The Comment first lays a foundation of disability theory, explaining the lens that informs the rest of the Comment. Second, the ways in which disability is affected by the relationship between technology and law is discussed—first by providing examples of how disability technology often reproduces the issues it seeks to address (including the misguided application of AI to prior authorization and the troubling use of electronic visit verification technology for at-home care), and then by examining how law stymies the potential of indisputably useful disability technology (focusing primarily on the issues associated with the coverage of durable medical equipment under Medicare). Third, this Comment explores how notions of dignity are employed as legal values in the United States. Finally, these preceding discussions are synthesized to argue for dignity as a useful legal mechanism for human rights generally, and disability rights specifically.

II. DISABILITY

The legal definitions of disability are much more complex and contextually varied than one might think. For instance, under the Social

2. *See generally*, The Public Health and Welfare, 42 U.S.C. § 12101 et seq; Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq; Olmstead v. L.C. by Zimring, 527 U.S. 581, 119 S. Ct 2176 (1999).

3. For an in-depth discussion of the notion of "administrative violence," *See generally*, Dean Spade, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW (South End Press, 1st ed. 2011).

Security Act (SSA), an adult's disability status is typically assessed based on multiple factors, including the existence of "a medically determinable physical or mental impairment" and how that impairment affects the person's capacity to work.[4] However, the SSA uses other criteria for people who are statutorily blind.[5]

Under the Americans with Disabilities Act (ADA)—the premier civil rights law for people with disabilities—disability is more broadly defined as "a physical or mental impairment that substantially limits one or more major life activities[6] of [an] individual."[7] Unlike the SSA, the ADA does not necessarily require the disability to affect a person's ability to work. Nonetheless, the benefits afforded an individual under the ADA are still deeply informed by the financial and economic interests of the non-disabled person or entity.[8] For instance, under Title I of the ADA, which addresses employment discrimination, employers are allowed to deny reasonable accommodations for employees with disabilities if they can prove that such accommodations would impose an "undue hardship"[9] for the organization's operations.[10]

To better understand these legal formulations of disability, it may be useful to discuss disability more generally. Disability is an umbrella term that encompasses anything from neurodivergence (e.g. autism spectrum or attention-deficit/hyperactivity disorder) to paraplegia. Yet, as disability and technology scholar Ashley Shew has noted, disability does not seem to be strictly based on the presence of a bodily impairment.[11] If it were, she points out, anyone requiring corrective lenses would be considered disabled.[12] In fact, bodily impairment does not appear to be either a

4. The Public Health and Welfare, 42 U.S.C. 416(i)(1)(A)(2024).

5. 42 U.S.C. 416(i)(1)(B)(2024).

6. A major life activity is a broad category that includes things ranging from general sets of actions (e.g. "caring for oneself") to specific abilities (e.g. seeing, hearing, breathing, reading, etc.) to the operation of major bodily functions (e.g. immunological, urinary, neurological, etc.) 42 U.S.C. § 12102(1-2)(2024).

7. Disability status can also be attained with a record of demonstrated impairment or by being regarded as having an impairment. 42 U.S.C. § 12102(1)(2024).

8. *See e.g.*, 42 U.S.C. §12112(b)(5)(A)(2024) (showing that demonstration of an "undue hardship on the operation of the business" as grounds for not providing reasonable accommodations to an employee).

9. *Id*. "Undue hardship" is "an action requiring significant difficulty or expense, when considered in light of" factors such as the "nature" and cost of accommodation required and the financial resources available to the employer.

10. *Id*.

11. ASHLEY SHEW, AGAINST TECHNOABLEISM: RETHINKING WHO NEEDS IMPROVEMENT 21 (Norton 2023).

12. *Id*.

necessary or sufficient requirement for disability status at all. As Shew argues, people with dwarfism may qualify as disabled, yet dwarfism does not imply the presence of an impairment or health issues.[13] Instead, the issues lie in the mismatch between the height of the individual and the height of the built world.[14]

The default understanding of disability for many people (and therefore the law) is likely based in what has been termed by critics as the "medical model of disability."[15] Under the medical model, disability is atomized; it is a deficiency present in the bodies or minds of certain individuals[16]—in other words, persons must be "fixed," but society need not be altered.[17] An inherently ableist and paternalistic conceptualization of disability, the medical model strictly defines normalcy. For decades, growing numbers of disabled self-advocates, medical care providers, intellectuals, and others have rejected this framing,[18] believing the focus on impairment to be problematic at best[19] and eugenic at worst.[20]

Alternate theories, such as the social model of disability and critical disability theory,[21] define disability not as a function of the individual's limitations (real or perceived), but rather as a function of the mismatch of an individual's needs and society's willingness to meet them.[22] These theories shift the focus from conforming individuals to an idealized notion of "normal" to highlighting society's shortcomings in recognizing and accommodating the rights and needs of diverse bodies and minds. In

13. *Id*.

14. *Id*.

15. Andrew J. Hogan, MA Ph.D., *Social and Medical Models of Disability and Mental Health: Evolution and Renewal*, 191 CAN. MED. ASS'N J. E16, E16 (Jan. 7, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6312522/.

16. *Id*.

17. Maria Berghs et al., *Implications for Public Health Research of Models and Theories of Disability: A Scoping Study and Evidence Synthesis*, NIHR J. LIBR. 26 (2016) ("Critics argue that this is a form of biological reductionism which views disability in terms of an individual deficit/problem that has to be fixed, rehabilitated or prevented rather than in terms of being generated by the social consequences of impairment.").

18. Hogan *supra* note 15.

19. *See generally*, *id*.

20. *See*, Press Release, Special Procedures, *New Eugenics: UN Disability Expert Warns Against 'Ableism' in Medical Practice*, U.N. Press Release (Feb. 28, 2020) https://www.ohchr.org/en/press-releases/2020/02/new-eugenics-un-disability-expert-warns-against-ableism-medical-practice.

21. Note: Although some do not see much difference between the social model and critical disability studies (Berghs, *supra* note 17 at 38), others argue the terminology of the social model has been co-opted, and should therefore be abandoned for other ideologically aligned theories, BEATRICE ADLER-BOLTON & ARTIE VIERKANT, HEALTH COMMUNISM 147 (Verso 2022).

22. Berghs, *supra* note 17, at 36, 38.

short, these models prioritize a person's dignity over mere administrative expediency.

Understanding the basics of these varying principles clarifies the limitations of bedrock disability law and aids in uncovering the ableist foundations on which other laws are built. To briefly revisit the SSA and ADA: Because the medical model assesses an individual's worth as a function of their productive potential,[23] determinations of whether benefits or accommodations should be furnished by the state, employers, and businesses become a cost-benefit analysis—pitting the disabled individual's interest in having their needs met (the benefit) against the cost of providing the accommodation or intervention.[24] [25] In other words, laws built around the medical model center the productive desires of society to the detriment of the dignity interests of people with disabilities.

III. TECHNOLOGY AND DISABILITY

There is nothing inherently wrong with technology or seeking solutions to genuine issues. Problems arise, however, when technology is used to advance a paternalistic and/or ableist worldview,[26] rather than focusing on addressing issues identified by the individuals experiencing them. This section discusses the tension between law, technology, and disability—first by examining examples where technologies fail to displace structural ableism, and instead reproduce and magnify it, and next by exploring how the benefits of uncontroversial disability technology are stymied by law.

A. Technology's Reproduction of Structural Ableism

Many people, experts and non-experts alike, have noted the ill effects of the trope of malingering—creating a nexus combining a fear of waste with the suspicion that people with disabilities may be exaggerating

23. For the SSA this is the ability to perform substantial gainful activity, 42 U.S.C. 416(i)(1)(A)(2024); for the ADA, "reasonableness" of accommodation is a function of a business's assets 42 U.S.C. §12112(b)(5)(A)(2024).

24. For an interesting overview of issues concerning the use of CBA in law and policy, *see* Law and Political Economy, *Symposia: Cost Benefit Analysis* (Sept. & Oct. 2021), https://lpeproject.org/symposia/cost-benefit-analysis/.

25. Relatedly, and rather alarmingly, there is some debate as to whether the ADA applies to things like arrests. *See* San Francisco v. Sheehan, 575 U.S. 600, 608-10 (2015).

26. For example, Elon Musk's claim that Neuralink's brain-implanted computer chips could one day "solve" autism and schizophrenia. Isobel Asher Hamilton, *Elon Musk Said His AI-Brain-Chips Company Could 'Solve' Autism and Schizophrenia*, BUS. INSIDER (Nov. 14, 2019), https://www.businessinsider.com/elon-musk-said-neuralink-could-solve-autism-and-schizophrenia-2019-11?op=1.

or outright lying about their conditions.[27] To combat alleged malingering, a constellation of administrative hurdles has been introduced, requiring individuals seeking treatment or accommodation to prove and reprove the existence of their condition. This process is not only burdensome but can also be quite opaque.[28]

A common (and rather vague) response to such administrative burdens is to simply "increase efficiency" of the onerous certification processes via technology. Proponents argue that decreasing the amount of work for both those seeking care and decision-makers would speed up the process, thereby decreasing the burdens within the system. While technology can indeed accelerate the process of specific tasks, the improved efficiency needs to be evaluated in the context of a broader issue: the concurrent rise in administrative difficulties related to accessing care. While these technologies may be perceived as time- and cost-saving solutions for patients and payers[29] alike,[30] the degree to which they obscure underlying structural issues warrants investigation.

Take, for example, the application of artificial intelligence (AI) to the schema of prior authorizations, the process whereby insurance companies assess the medical necessity of a medication or procedure to determine whether the care will be covered.[31] In theory, the process aims to address the supposed over-prescription of unnecessary medical treatments;[32] in practice, however, it is widely understood to be

27. *See* Shew *supra* note 11, at 38; Bolton *supra* note 21, at 24; Anni Layne Rodgers, *FDA Commissioner Blames Adderall Shortage on Stimulant Overuse, Telehealth, Generics*, ADDITUDE (June 27, 2023), https://www.additudemag.com/adderall-shortage-stimulant-use-telehealth-califf/.

28. For example, the SSA requires that a person with a disability requalify periodically to determine whether disqualifying health changes (medical improvements) have occurred since the last qualification. 20 CFR § 404.1594(a)(2017). Failure to adequately comply will result in termination of benefits, 20 CFR § 404.1594(e)(2017), yet compliance can be extremely disruptive to the life of a person with a disability. *See e.g.*, Letter from Barbara Silverstone, Executive Director, Nat'l Org. Soc. *Sec. Claimants' Representatives, to Andrew Saul*, Comm'r, SSA (Jan. 6, 2020), https://nosscr.org/wp-content/uploads/2020/01/NOSSCR-comments-continuing-disability-reviews-final.pdf

29. I.e. insurance companies and governments.

30. Shahed Al Haque et al., *AI Ushers in Next-Gen Prior Authorization in Healthcare, McKinsey* (Apr. 19, 2022), https://www.mckinsey.com/industries/healthcare/our-insights/ai-ushers-in-next-gen-prior-authorization-in-healthcare.

31. Katie Jennings, *Google Releases AI Tools to Speed up Health Insurance Preapprovals*, FORBES (Apr. 13, 2023), https://www.forbes.com/sites/katiejennings/2023/04/13/google-releases-ai-tools-to-speed-up-health-insurance-preapprovals/?sh=75b3e46248eb.

32. Cigna Healthcare, https://www.cigna.com/knowledge-center/what-is-prior-authorization (last visited Apr. 15, 2024) ("The prior authorization process gives your health insurance company a chance to review how necessary a medical treatment or medication may be

responsible for significant patient harm.[33] According to a survey of practicing physicians conducted by the American Medical Association (AMA), sixty-four percent of doctors report that the prior authorization schema has compelled patients to deviate from the doctor's recommended medical intervention towards ineffective initial treatments.[34] Additionally, forty-six percent of respondents noted that prior authorization hurdles have resulted in urgent or emergency care for their patients.[35]

The efficiency-motivated application of AI to the prior authorization regime has only exacerbated the fundamental issues of this practice. In 2023, ProPublica reported that over the course of two months, 300,000 coverage requests were denied by the insurance company Cigna.[36] What made the figure even more alarming, however, was the revelation that Cigna doctors had spent an average of 1.2 seconds on each case[37]—a possibility only afforded by the bulk reviewing abilities of AI.

The class action suit filed against Cigna, prompted by these revelations, alleges that the insurance company "deliberately fail[ed] to fulfill [its] statutory obligation to review individual claims in a thorough, fair, and objective manner," and "instead deny[ed] the claims . . . without conducting any investigation" whatsoever.[38] By operating in such a manner, plaintiffs argue, "Cigna breached its fiduciary duties . . . of good faith and fair dealing" to such a degree as to constitute fraud.[39]

The Medicare Advantage system—described as a private insurance "alternative to traditional Medicare"—has faced comparable issues.[40] UnitedHealth and Humana are both utilizing an AI model that has been

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in treating your condition . . . . During their review, your health insurance company may decide a generic or another lower-cost alternative may work just as well in treating your medical condition.").

33. *2022 AMA Prior Authorization (PA) Physician Survey*, Am. Med. Ass'n (2023), https://www.ama-assn.org/system/files/prior-authorization-survey.pdf (hereinafter "*AMA PA Physician Survey*"; Kevin B. O'Reilly, *1 in 3 Doctors Has Seen Prior Auth Lead to Serious Adverse Event*, Am. Med. Ass'n (Mar. 29, 2023), https://www.ama-assn.org/practice-management/prior-authorization/1-3-doctors-has-seen-prior-auth-lead-serious-adverse-event.

34. *AMA PA Physician Survey supra* note 33; O'Reilly *supra* note 33.

35. *AMA PA Physician Survey supra* note 33; O'Reilly *supra* note 33.

36. Patrick Rucker et al., *How Cigna Saves Millions by Having Its Doctors Reject Claims Without Reading Them*, PROPUBLICA (Mar. 25, 2023), https://www.propublica.org/article/cigna-pxdx-medical-health-insurance-rejection-claims.

37. *Id*.

38. Kisting-Leung v. CIGNA Corp., No. 2:23-cv-01477-DAD-KJN at 4 (E.D. Cal. filed July 24, 2023), (internal quotations omitted).

39. *Id*. at 2.

40. Casey Ross & Bob Herman, *Denied by AI: How Medicare Advantage Plans Use Algorithms to Cut off Care for Seniors in Need*, STAT (Mar. 13, 2023), https://www.statnews.com/2023/03/13/medicare-advantage-plans-denial-artificial-intelligence/.

claimed to incorrectly deny coverage to a significant number of clients.[41] Among the denials that are appealed, about ninety percent are subsequently reversed.[42] Similar to Cigna, the use of AI by both UnitedHealth and Humana is being challenged in court.[43]

In February 2024, apparently in response to the suits against UnitedHealth and Humana, the Centers for Medicare and Medicaid Services issued guidance to Medicare Advantage insurers regarding permissible use cases regarding AI. They also somewhat weakly "remind[ed] [them] of the nondiscrimination requirements of . . . the Affordable Care Act."[44]

The technologization of the suspicion of fraud and fear of wasteful spending does not only show up in health coverage decisions. For disabled people on Medicaid who use at-home care services, electronic visit verification (EVV) has been a relatively recent source of technoindignification.[45] EVV is a time and task-reporting technology[46] aimed at preventing "fraud, waste, and abuse through increased visibility into . . . Home and Community-based Services Programs."[47] Since January 2023, states must implement EVV for their Medicaid recipients receiving in-home services.[48]

The technologies—capable of being deployed via specialty devices, mobile apps, or websites—require both the care provider and the person with a disability to record the exact hours, tasks, and locations worked.[49] The technologies add overly rigid design, arbitrary procedures,[50] and

41. Est. of Lokken v. UnitedHealth Grp. Inc., 2024 WL 3677896 at 1, 3 (D. Minn. Aug. 6, 2024); Barrows et al v. Humana Inc., No. 3:23-CV-00654 at 1 (W.D. Ky. filed Dec. 12, 2023).

42. *Lokken*, 2024 WL 3677896 at 14; *Barrows*, No. 3:23-CV-00654 at 11.

43. *See generally*, *Lokken*, 2024 WL 3677896; *Barrows*, No. 3:23-CV-00654.

44. *Frequently Asked Questions Related to Coverage Criteria and Utilization Management Requirements in CMS Final Rule (CMS-4201-F)*, DEP'T HEALTH HUM. SERV. CTR. MEDICARE MEDICAID SERV. at 3 (Feb. 6, 2024).

45. Virginia Eubanks & Alexandra Mateescu, *'We Don't Deserve This': New App Places US Caregivers Under Digital Surveillance*, THE GUARDIAN (July 28, 2021), https://www.theguardian.com/us-news/2021/jul/28/digital-surveillance-caregivers-artificial-intelligence.

46. Lydia X. Z. Brown et al., *Ableism and Disability Discrimination in New Surveillance Technologies*, CTR. DEMOCRACY & TECH., May 2022, at 46.

47. DEP'T HEALTH HUM. SERV. CTR. MEDICARE MEDICAID SERV., *Electronic Visit Verification (EVV) Certification*, ver. 1.0, 2019 at 4.

48. 42 U.S.C. § 1396b(i)(1)

49. Brown *supra* note 46.

50. Eubanks *supra* note 45. ("But for Morell, the real problem is that EVV's inflexibility adds new and seemingly arbitrary responsibilities to an already demanding job. Morell has to clock in and out of the app as often as four times a day, and on a fixed schedule, even though Carolyn gets care whenever she needs it, not at predetermined times."); Brown *supra* note 46, at 47.

extremely invasive capabilities[51] to an already onerous process. One particularly absurd example can be found in the use of an EVV technology's GPS and geofencing capabilities. Some states have required activation of the location features,[52] ostensibly to prevent the fraudulent recordation of services from a place other than the client's home. In practice, however, this makes assisting with normal activities, such as errands or doctors visits, much more difficult.[53]

The beneficiaries of the services are also burdened by the detailed requirements of the systems. For instance, the hyper-specificity may require constant documentation of intimate details of a disabled person's day-to-day, and the daily requirement to approve logs submitted by the caregiver can be quite overwhelming.[54] This combination of factors, notably, impacts the quality of care provided, the manner of its delivery, and the conditions under which it occurs[55]—in essence, these aspects are detrimental to the dignity of disabled individuals.

Law, technology, and disability can coexist harmoniously. However, if the technology is adopted without examining the underlying ableism (and/or general immorality) of legal foundations, the efficiencies gained can exacerbate the harm done to individuals' dignity. Although only a few examples were mentioned above, similar troubling patterns of the technologization of ableism become apparent. Once noticed, it begins to reveal itself everywhere.

B. Law's Indignifying Effect on Genuinely Useful Disability Technology

Where the last section discussed technology's magnifying effects on troubling law, there are instances where law constrains genuinely beneficial technology. These examples illustrate the truly Kafkaesque nature of the law in the lives of some people with disabilities.

51. Such as tracking users using GPS or geofencing. Brown *supra* note 46, at 48.
52. Note: These are not federally mandated, but states are free to use them. *Id*.
53. *Id*. at 47.
54. *Id*. at 48.
55. *Id*.

One such example can be found in Medicare[56] Part B's[57] peculiar scope of coverage.[58] Under Part B, durable medical equipment (DME)[59] will only be covered if it is prescribed by a medical professional for home use.[60] This means, to use the agency's own words, "Medicare won't cover a power wheelchair or scooter that [a person] only need[s] and use[s] outside of the home."[61]

Caveats like this may affect ambulatory wheelchair users, for example. Ambulatory wheelchair users are disabled individuals who have the ability to walk and stand but use wheelchairs in certain situations[62] or during periods when symptoms change to require the device.[63] Part B's coverage leaves unquestioned the need for mobility devices out of the home, and yet it nonetheless denies coverage for those whose disability needs don't match the imagined norm.[64]

Medicare's problematic scope of durable medical equipment can also affect the coverage of other technologies that are useful for people with disabilities. To be considered DME, the equipment must generally

56. Medicare is the federal health insurance program serving people over the age of 65 and certain qualifying individuals with disabilities or specific diseases. *Parts of Medicare*, MEDICARE.GOV, https://www.medicare.gov/what-medicare-covers/your-medicare-coverage-choices/whats-medicare (last visited Apr. 15, 2024).

57. Part B is the portion of Medicare that focuses on medically necessary services and supplies and preventative care. *Id*.

58. *What Part B Covers*, MEDICARE.GOV, https://www.medicare.gov/what-medicare-covers/what-part-b-covers (last visited Apr. 15, 2024).

59. Referring to medical equipment that, in general terms, can endure sustained use. *Durable Medical Equipment*, MEDICARE.GOV, https://www.medicare.gov/coverage/durable-medical-equipment-dme-coverage (last visited Apr. 15, 2024).

60. *Id*.

61. *Medicare Coverage of Durable Medical Equipment & Other Devices*, U.S. DEP'T OF HEALTH & HUM. SERVS. CTRS. FOR MEDICARE & MEDICAID SERVS. MEDICARE.GOV, 4, (2024), https://www.medicare.gov/media/publication/11045-medicare-coverage-of-dme-and-other-devices.pdf.

62. *E.g.*, to avoid fatigue, pain, or other negative effects caused by walking or standing. David Oliver, *'I Live a Beautiful Life': What Wheelchair Users Wish You Knew—and What to Stop Asking*, USA TODAY (July 21, 2021), https://www.usatoday.com/story/life/health-wellness/2021/07/21/wheelchair-users-talk-disturbing-questions-what-they-wish-you-knew/8017662002/; Nicola Sarsfield, *Ambulatory Wheelchair Users; Who Are They?*, MEDIUM (Mar. 31, 2022), https://medium.com/@nicola.sarsfield/ambulatory-wheelchair-users-who-are-they-a78c2592c893.

63. Lauren, *Ten Things I Wish You Knew (from an Ambulatory Wheelchair User)*, RARE YOUTH REVOLUTION (Apr. 21, 2023), https://www.rareyouthrevolution.com/post/ten-things-i-wish-you-knew-from-an-ambulatory-wheelchair-user.

64. Alex Wegman, *For the Love of Wheelchairs*, GRIT (May 31, 2022), https://blog.gogrit.us/uncategorized/for-the-love-of-wheelchairs/; *Medicare Coverage of Durable Medical Equipment & Other Devices*, *supra* note 61.

be (1) "[able to] withstand repeated use," (2) "primarily and customarily used to serve a medical purpose," (3) "generally . . . not useful to a person in the absence of illness or injury," and (4) "appropriate for use in a patient's home."[65] Under these criteria, tools that may exist for general use but are important for the disabled person's health—such as humidifiers or air purifiers—are not covered because they are "not primarily medical in nature."[66]

In certain instances, DME must fulfill additional specific criteria. For example, to be covered, speech generating devices (SGD)—which are a kind of augmented and alternative communication (AAC)[67] tool—must: (1) have an expected life of at least three years, (2) be limited to use by a patient with a severe speech impairment, and (3) be primarily used for the purpose of generating speech.[68] This indicates that although an SGD might be an iPad with a specialized app, for instance, only the app's cost would be covered.[69] To further clarify the narrow scope of coverage, the necessary equipment that enhances the utility of SGD in everyday life (such as carrying cases, straps and handles) are classified as "convenience item[s]" and are therefore not covered.[70]

The instances where the law adversely impacts undeniably beneficial technology are countless. Although there have been some noteworthy victories in this area—such as Colorado's passage of a wheelchair-specific right to repair law[71]—the implications of these victories have been disappointingly limited (i.e., the scope does not extend to other technologies, or states). Considering these issues in the context of legal and human dignity may provide valuable insights for contemplating reform.

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65. *Durable Medical Equipment (DME) Reference List*, CTRS. FOR MEDICARE & MEDICAID SERVS. MS.GOV, https://www.cms.gov/medicare-coverage-database/view/ncd.aspx?&&NCDId=190&ncdver=1&NCDSect=280.1&bc=BEAAAAAAAQAAAA%3D%3D (last visited Apr. 15, 2024).

66. *Id*.

67. AAC is the umbrella term for various ways people can communicate without speaking. This includes methods from writing and gesturing to speech-generating technologies. *Augmentative and Alternative Communication (AAC)*, AMERICAN SPEECH-LANGUAGE-HEARING ASSOCIATION, https://www.asha.org/public/speech/disorders/AAc/ (last visited Apr. 15, 2024).

68. *Speech Generating Devices (SGD)—Policy Article*, CTRS. FOR MEDICARE & MEDICAID SERVS. CMS.GOV, https://www.cms.gov/medicare-coverage-database/view/article.aspx?articleid=52469 (last visited Apr. 15, 2024).

69. *Id*.

70. *Id*.

71. H.B. 22-1031, 2022 Gen. Assemb., Reg. Sess. (Colo. 2022).

IV. DIGNITY

Dignity is an enigma in American law. Indeed, the term does not appear in the U.S. Constitution, yet it significantly influences American jurisprudence.[72] Appeals to dignity have been present in Supreme Court opinions since 1793;[73] however, unlike in foreign jurisdictions[74] and international law,[75] dignity is often invoked in an impotent manner within the American context.[76]

Nonetheless, the notion of dignity has been widely used to analyze human rights. Although some critics argue that dignity can mean anything, and therefore it means nothing,[77] others counter that this perceived malleability is not so dissimilar from appeals to "liberty" or "equality," as they are, by their very nature, both "capacious yet fundamental" to constitutional rights.[78]

The difficulty in discerning the exact contours of the concept may partially explain the Court's historical reluctance to explicitly create a right to dignity. Adeno Addis has noted that despite the ambiguities of the concept of dignity, most theorizers appear to agree on a throughline, allowing for use of the concept while sidestepping an exact definition.[79] A dignified status seems to imply the protection of the physical, psychological, and social "dimensions of what it means to be human."[80] Thus, respecting someone's dignity entails complying with the "moral requirements [of recognition] that are placed on one by the existence of other persons."[81] In essence, ensuring dignity equates to securing the essential foundations for life in its broadest context.

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72. ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 71 (U. Pa. Press 2013).

73. *Id*. at 72; Chisholm v. Georgia, 2 U.S. 419, 450-56, 471-72 (1793).

74. *E.g*., S. AFR. CONST., 1996, ch. 2.10; THE POLITICAL CONSTITUTION OF PERU Dec. 31, 1993, ch. 1 art. 1.

75. G.A. Res. 217 (III) A, *Universal Declaration of Human Rights* (Dec. 10, 1948); GA Res. 2200A (XXI), *International Covenant on Civil and Political Rights*, Preamble (Dec. 16, 1966).

76. *See, e.g*., *Chisholm*, 2 U.S. at 451 ("dignity of a State"); Deck v. Missouri, 544 U.S. 622, 631 (2005) (explaining how shackling the defendant during a capital proceeding undermines the "courtroom's formal dignity").

77. Jeffrey Rosen, *The Dangers of a Constitutional 'Right to Dignity'*, THE ATLANTIC (Apr. 29, 2015), https://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796/ (listing examples where "elastically" defined appeals to dignity may be abused).

78. *Equal Dignity—Heeding Its Call*, 32 HARV. L. REV. 1323, 1324 (2019).

79. ADENO ADDIS, THE DIGNITY OF BELONGING, IN HUMAN FLOURISHING: THE END OF LAW 45, 47-48 (W. Michael Reisman & Roza Pati eds., 2023).

80. *Id*. at 45, 48.

81. *Id*. at 45.

Carlo Leget finds value in inquiring deeper. In his work, Leget theorizes that part of the difficulty of defining the concept is due to the existence of, and confusion between, three types of dignity: subjective dignity, or the personal conceptions of dignity directed inwardly (e.g. living a personally meaningful life, however defined)[82]; social and relational dignity, or the expression of respect directed toward another (e.g. connecting with others on an emotional level)[83]; and intrinsic dignity, or the fundamental respect afforded to an individual by virtue of being human (e.g. the belief that humans are made in the image of God or the right to dignity afforded by the Declaration of Human Rights).[84] When dignity is understood narrowly to mean just one or two of these types, appeals to dignity can become nonsensical, thereby leading to the justification of plainly wrong outcomes.[85]

A. Dignity as a Legal Value in the American Context

Despite its somewhat odd application of dignity in early jurisprudence, the U.S. Supreme Court during and following World War II increasingly implicated human dignity as a constitutional value.[86] According to Erin Daly, dignity was first applied as an individual right in Justice Jackson's 1942 concurrence in *Skinner v. Oklahoma*.[87] In a unanimous ruling, the Court held that a state law requiring the forced sterilization of certain "habitual criminal[s]" was unconstitutional.[88] Daly notes that Justice Jackson's concurrence, which identifies "limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority," establish the foundations of dignitarian jurisprudence.[89] First, she observes, the statement recognizes dignity as inherent to all humans by right of being human.[90] Second, the statement

82. Carlo Leget, *Analyzing Dignity: A Perspective from the Ethics of Care*, SPRINGER, 945, 947 (2012).
83. *Id*. at 948.
84. *Id*. at 949.
85. *Id*. at 949.
86. DALY, *supra* note 72, at 82.
87. *Id*.; 316 U.S. 535, 546 (1942) (Jackson, J. concurring).
88. *Skinner*, 316 U.S. at 537.
89. *Id*. at 546 (Jackson, J. concurring).
90. DALY, *supra* note 72, at 82.

recognizes that certain actions may be injurious to dignity.[91] Third, Constitutional protections may exist to prevent such injury.[92] [93]

In the years and decades following *Skinner*, dignity would be repeatedly used to articulate justices' displeasure with majority opinions. For example, in a 1944 dissent in *Korematsu v. United States*—the case that upheld the constitutionality of the internment of Japanese Americans during World War II[94]—Justice Murphy lambasted the Majority's approval of collective punishment at the expense of the individual: "To give constitutional sanction to that inference in this case . . . is to adopt one of the cruelest . . . rationales . . . to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow."[95]

Just a year later, in *Screws v. United States*—Justice Murphy once again appealed to human dignity in a dissent, observing its constitutional recognition and guaranteed status.[96] *Screws* involved the extra-judicial killing of Robert Hall—a Black man—by police, and the subsequent federal prosecution and conviction of the individuals responsible.[97] While the circuit court affirmed the conviction, the majority of the Supreme Court reversed and remanded for a new trial.[98] In his opinion, Justice Murphy asserted that Hall's right to trial and right to life—both of which were denied—were entitled to him not only for being an American citizen, but also for simply being a human.[99] "As such," Murphy noted, "he was entitled to all the respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution."[100]

91. *Id*.

92. *Id*.

93. Especially given the subject of this Comment, it bears mentioning that as Justice Jackson decried the inhumanity of the forced sterilization of individuals convicted of a crime, he did so by contrasting it from the forced sterilization of people with intellectual disabilities, which in his view, evidently, fell well within the "limits to the extent to which a . . . majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority." *Skinner*, 316 U.S. at 546 (Jackson, J. concurring); *see also*, Buck v. Bell, 274 U.S. 200 (1927).

94. 323 U.S. 214, 223-24 (1944) (Murphy, J. dissenting).

95. *Id*. at 240.

96. 325 U.S. 91, 134-35 (1945) (Murphy, J. dissenting).

97. *Id*. at 92-4.

98. *Id*. at 113.

99. *Id*. at 134-35.

100. *Id*. at 135.

But recognition of the value of human dignity has not been solely relegated to dissents.[101] In *Miranda v. Arizona*—the 1966 case establishing the constitutional requirement for law enforcement, prior to interrogation, to notify persons of their rights to an attorney and to remain silent during the interrogation—the majority used dignity as a rationale for its ruling.[102] Reasoning that because the practice of incommunicado interrogation—due to its inherently intimidating nature—was injurious to human dignity, and citing the right against self-incrimination, the Court required "adequate protective devices" to be put in place.[103] Noting that the right against self-incrimination was "founded on a complex of values" based on the "respect a government . . . must accord to the dignity and integrity of its citizens," the Court reasoned that governments seeking a conviction must "shoulder the entire load" of investigations and not rely on less burdensome tactics such as compelling confessions.[104]

Beyond the criminal context, the Court has also relied on human dignity to analyze questions of law such as free speech,[105] social entitlements,[106] and civil rights.[107] In *Goldberg v. Kelly*, the Court considered whether the due process clause of the Fourteenth Amendment was violated when a state terminated welfare benefits for a recipient

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101. *See Miranda v. Arizona*, 384 U.S. 436, 460 (1966); *see also*, Carter v. Illinois, 329 U.S. 173, 175 (1946) ("It is for [states], therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures."); Roper v. Simmons, 543 U.S. 551, 578 (2005) ("The [Constitution] sets forth, and rests upon, innovative principles original to the American experience, such as . . . broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity.").

102. *See* 384 U.S. 436, 460, 467-68 (1966).

103. *Id*. at 458.

104. *Id*. at 460.

105. *See* Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.").

But see, Boos v. Barry, 485 U.S. 312, 322 (1988) (declining to establish a "dignity standard" as it had previously refused to do with an "outrageousness" standard in order to protect free speech).

106. *See* Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970).

107. Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984) ("[The] Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.").

without first affording the recipient a hearing.[108] Noting the United States' long commitment to "foster[ing] the dignity and well-being of all persons within its borders," the court observed that the nation had "come to recognize that forces not within the control of the poor contribute to their poverty."[109] These factors, the Court further reasoned, informed the underlying need for public assistance.[110] Because welfare helps individuals meet the basic human needs of the population—because it fosters dignity by defending against personal insecurity—it is a way to "secure the Blessings of Liberty" for the population and its collective future.[111]

The prolific use of dignity in a wide variety of circumstances does not imply a uselessly diffuse concept; dignity's treatment is too coherent and too consistent to infer such a thing. Instead, the application of dignity in American jurisprudence suggests a specific and robust, yet flexible concept that can be employed when the very idea of humanness is being litigated.

V. A RIGHT TO DIGNITY AS THE WAY FORWARD

Given the diverse nature of disability, technology, and law, it is impossible to adequately cover all the ways entrenched ableism may negatively affect the lives of people with disabilities. At the same time (and as discussed in the previous section), dignity as a legal concept is at once meaningfully specific enough to be actionable, yet flexible enough to be applicable to a wide set of scenarios. Given these unique characteristics, and the rich (though admittedly somewhat odd) history of its use by the Supreme Court, official recognition of a right to dignity may be a suitable legal antidote to the law's ableist status quo.[112] Such a right would guarantee a minimum level of "respect a government . . . must accord to the dignity and integrity of its citizens"[113] while requiring

108. 397 U.S. 254, 255 (1970).

109. *Id*. at 265.

110. *Id*. at 265.

111. *Id*.; *see also*, Brown v. Plata, 563 U.S. 493, 510-11 (2011) (noting the state's responsibility—here, in the context of incarceration—to provide adequate medical care, as the failure to do so would be "incompatible with the concept of human dignity and . . . civilized society.").

112. Given the inherent health care and health care-adjacent nature of this Comment, it seems important to note the significant benefits that a move to a truly universal and justice-oriented (i.e. dignity-enhancing) health care and welfare system would have on the public in the United States. A more detailed discussion on the matter, however, is out of scope of this piece.

113. *Miranda*, 384 U.S. at 460.

government bodies to actively "foster the dignity and well-being of all persons within its borders."[114]

But the right to dignity need not be confined only to jurisprudence. Dignitarian principles could also be utilized in administrative law—both in the rulemaking process and as elements of the rules themselves. Regarding the rulemaking process, agencies could be required to consider (and heavily weigh) the dignity interests of individuals affected by the proposed rule. However, in pursuing this analysis, there should not be attempts to reduce dignity to monetary terms as is done in cost-benefit analysis. The power of considering dignity lies in its unquantifiable yet immediately recognizable nature. The exercise of heavily weighing the dignity of affected individuals would help build a structure to mitigate ableist presuppositions upon which many rules are founded, such as the malingering trope.

The process of determining what defines a durable medical device could also be shaped by considerations of dignity. Viewed through this lens, the arbitrary notion of what "normal" lives for disabled people should look like would diminish, and consequently, so too would the justifications for technologies like EVV and AI use in coverage decisions.

Dignity could also be incorporated into laws and rules themselves. For example, rules such as the requirement that assistive technologies be primarily and customarily used to serve a medical purpose in order to be covered by Medicare could be replaced. In their wake, requests for assistive equipment and technology could be reviewed according to less onerous criteria. The requirement for requested equipment might simply be that it bears a rational relation to the disability. Additionally, the burden for denial of coverage could shift to payers, who would bear the responsibility of proving that denials would not infringe upon the dignity interest of the insured. When articulated, the right to dignity and what it implies may appear utopian, and perhaps it is. But in the face of tremendous administrative violence, and in recognition of the inherent value of every person, it is difficult to find justification for not pursuing a minimum dignity threshold.

114. *Goldberg*, 397 U.S. at 265.