INTERNATIONAL ANIMAL RIGHTS: SPECIESISM AND EXCLUSIONARY HUMAN DIGNITY

By
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The primary goal of this paper is to act as a heuristic device, to suggest an unconventional but practical perspective on the evolution of international law. Upon surveying discourse on the history of international law, texts of treaties, and declarations and writings of influential philosophers of law and morality, an antiquated perspective of humanity is apparent. A convention in international law, and a reflection of a common idea which feeds the foreboding trend of how humans relate to the planet, treats humanity as distinctively separate from the Earth's biodiversity. Though environmental law is beginning to recognize the necessity of conserving biodiversity, a subjugating conceptualization of other species has inhibited the development, application, and legitimacy of the principle of sustainability. The belittling view of other species in relation to ourselves also creates inconsistencies within international law and undermines the integrity and sophistication of its development. International human rights law is especially affected.

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I. INTRODUCTION

Expanding the circle of international human rights to include nonhumans is counterintuitive and perhaps legally impossible. In international law, the primary basis for human rights is that we are not like other animals. For example, the preamble of the African Charter on

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Human and Peoples' Rights states that "fundamental human rights stem from the attributes of human beings, which justifies their international protection . . . ."[1] Instead of building upon existing legal doctrine, animal rights lawyers should be seeking a redefinition of human rights—not an expansion.

The most commonly stated basis for international human rights is human dignity. The Universal Declaration of Human Rights set the stage with Article I, to which all subsequent human rights treaties refer. Article I states, "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood . . . ."[2] Human dignity traditionally has been defined by legal theorists and philosophers in a manner that derives from arrant human chauvinism.[3] This is unfortunate for two reasons. First, relying on a speciesist definition of human dignity undermines the cogency of human rights because it is scientifically and philosophically untenable. Second, basing human rights on irrational or metaphysical concepts makes it more difficult to debunk speciesism because of the subsequent recognition that legal rights are manufactured. With the goal of scientific and multi-cultural legitimacy, international human rights law might otherwise refer to non-metaphysical and permanent bases. This requires eradicating the species-based element.

This paper is separated into two parts. The first section will address the perspective that humanity is somehow superior to all other animals. The argument will focus primarily on the most ostensibly convincing and legally relevant claim for human superiority: our ability to reason. The Author will discuss how the existence of speciesism in law represents and condones an antiquated approach to international law. The second section discusses the concept of human dignity, which is defined implicitly and sometimes explicitly by international human rights instruments as being founded on our humanness. This conception is, in effect, exclusionary and irrational.

II. SPECIESISM AND HUMAN REASON

A Latin apothegm states, "in the world there is nothing great but man, and in man there is nothing great but mind."[4] The appearance of legal systems commonly is purported to be the result of humans' superior consciousness and ability to reason. It is also a common belief that before human-made law, what existed were simply instinctive reactions of human and nonhuman animals to their surroundings.[5] Steven Bartlett notes that legal discussions on the status of other animals fo-

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[1] *International Human Rights Documents* 336 (P.R. Ghandi ed., 3d ed. Oxford U. 2002).

[2] *Id.* at 22.

[3] *Infra* pt. III(A), *Dignity without Merit*.

[4] John Maxcy Zane, *The Story of Law* 4 (2d ed., Liberty Fund 1998).

[5] *Id.*

cus primarily on the issues of property and standing.[6] Little has been said about frameworks of conception or psychology that cause law to be anthropocentric.[7] Common law and legislation are produced by the activity of humans, and therefore bear the mark of our mentality.[8] Throughout most of documented history, humans have denied other animals legal rights and recognition as legal persons with two justifications: the "theological basis" and a "secular expression of species pride."[9]

Since international law today broadly draws its germination from Europe, both of the above reasons for excluding other animals from legal entitlement can be traced in part to the Judaeo-Christian tradition, in which the Bible explains in the book of Genesis, inter alia, that the Earth and all Earth's nonhuman inhabitants are man's to rule.[10] Although, like the Judaeo-Christian tradition, other dominant world religions generally preach compassion and responsibility toward other animals, they all profess man's inherent existential superiority.[11] This is influenced by the much more pervasive roots of the secular aspect of speciesism, which conspire to determine that other species are inferior with several different explanations.[12] What the explanations all have in common is the claim that other animals either lack or are deficient in qualities for which humans claim pride; for example, human reason, language, and use of symbols, humor, reflective capacity, and self-awareness.[13] Our tendency to infer these differences between us and other creatures has created a heuristic riddle, to which our answer has been to shift human supremacist claims from one reputed human-only asset to another, as sciences like biology, genetics, and anthropology have revealed evidence that one "uniquely human" trait after another turns out to be not so unique.[14] The law has not kept up, and continues to validate our value-laden misconceptions.

John Maxcy Zane eloquently reprimands such legal conservatism:

> The time has long gone by when one should apologize for running counter to human conceptions that are founded upon human ignorance, inherited prejudice, or crass stupidity. If the purpose were to write a work upon geog-

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[6] Steven J. Bartlett, *Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks*, 8 Animal L. 143, 144 (2002).

[7] *Id.*

[8] *Id.*

[9] *Id.* at 149.

[10] God commanded Adam and Eve to "fill the earth and subdue it. Rule over the fish of the sea and the birds of the air and over every living creature that moves on the ground." *Genesis* 1:28 (New Intl.).

[11] Paul Waldau primarily contrasts Christianity with Buddhism, which is often viewed by nonhuman animal rights activists as more reasonable in its view of nonhumans. Nevertheless, he finds Islam, Hinduism, and even Buddhism espousing speciesism. Paul Waldau, *The Specter of Speciesism: Buddhist and Christian Views of Animals* 137 (Oxford U. Press 2002).

[12] *Id.*

[13] Bartlett, *supra* n. 6, at 149.

[14] *Id.* at 149–50.

> raphy, it would not be necessary to begin with an extended demonstration of the spherecity of the earth, although a few centuries ago a man could, with entire legality, have been burned at the stake for asserting such a proposition.[15]

Though it is unlikely anti-speciesists will be burned at the stake, international law has not yet reached a time when rejection of bigotry expands to non-human animal rights.

The first part of this section re-evaluates the philosophical justification for legal speciesism to which sources of international law commonly refer, citing Immanuel Kant and John Stuart Mill among others. Next, it provides an assessment of the importance of logic and empiricism—fundamental aspects of science—to integrating a more rational approach to law. Renunciation of speciesism is essential to a modernization of international law, which discards an ontological approach for an approach more scientific, objective, and consensus-based.[16] Rene Descartes's famous quip "*cogito ergo sum*,"[17] with great irony, is vacuous in terms of evolutionary biology. Nevertheless, like the aforementioned Latin apothegm, this kind of self-infatuated anthropocentrism has set the stage for development of international law.

A. Logic, Metaphysics, and Utilitarianism

The most legally significant justification for speciesism, superior cognition, is tautological. Alfred Jules Ayer said, "a proposition can be said to be a tautology if it is analytic; and I hold that a proposition is analytic if it is true solely in virtue of the meaning of its constituent symbols, and cannot therefore be either confirmed or refuted by any fact of experience."[18] Ergo, if we are to rule out tautological arguments for human supremacism, we can exclude those that are metaphysical, since Kant said the root of metaphysics is "the [pre]occupation of reason merely with itself" and that metaphysics comprises the supposed

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[15] Zane, *supra* n. 4, at 3.

[16] McLaughlin makes this argument with regard to anthropocentrism, describing how law has not evolved along with approaches to developing scientific understanding. Andrew McLaughlin, *Regarding Nature: Industrialism and Deep Ecology* 148 (St. U. of N.Y. Press 1993).

[17] "I think, therefore I am." Rene Descartes, *Discourse on Method*, in *Discourse on Method and Meditations on First Philosophy* 19 (Donald A. Cress trans., 3d ed., Hackett Pub. Co. 1993). Descartes, beginning his search for truth by working backwards to find one statement of pure truth from which to deduce other truths, said he had:

> [R]esolved to pretend that everything that had ever entered my mind was no more true than the illusions of my dreams. But immediately afterward I noticed that, during the time I wanted thus to think that everything was false, it was necessary that I, who thought thus, be something. And noticing this truth—*I think, therefore I am*—was so firm and so certain that the most extravagant suppositions of the skeptics were unable to shake it, I judged that I could accept it without scruple as the first principle of the philosophy I was seeking.

Id. at 18–19.

[18] Alfred Jules Ayer, *Language, Truth and Logic* 16 (Dover Publications, Inc. 1952).

knowledge of "objects arising immediately from [reason's] brooding over its own concepts, without requiring, or indeed being able to reach that knowledge through, experience."[19]

A tautology also can be a circular argument, to which the Kantian non-metaphysical justification for speciesism is reduced. First, the cognitive abilities that humans have are the greatest assets an animal can possess. Second, humans possess this ability and other animals do not. Third, humans are superior because they have this asset. Kant understood that number one was an assumption, yet he found himself in a conundrum trying to legitimize it because every explanation ended as a tautology as well, or it became metaphysical again. Ayer said this is the reason Kant condemned transcendent metaphysics—that "human understanding was so constituted that it lost itself in contradictions when it ventured out beyond the limits of possible experience and attempted to deal with things in themselves."[20]

Ultimately, any explanation for the primary assumption that human cognition is a superior asset will be circular because, whether through Kant's mind or Ayer's, human reasoning is working to justify itself as the most important earthling asset. But certainly Reason has a conflict of interest and cannot be subjective. One tactic Reason has used to deal with this is what Bartlett calls "projective misconstruction," in which the existence of certain objects of reference is denied.[21] Reason does not recognize itself as a point of reference, and is then intentionally "projected" to the exterior of the frame of reference which makes that reference possible in the first place. Another type of projective misconstruction is the argument that a human construct, such as human morality or a god, rises above explanation within the frame of reference used to refer to those constructs.[22] Thus, speciesist arguments using projective misconstructions are quintessential tautologies in that they are necessarily analytic, self-justifying, and logically inept.

Kant did not have the benefit of Charles Darwin's discoveries in biological evolution, nor subsequent knowledge gained in genetics, paleontology, or anthropology. He was once a follower of Descartes, which inarguably abetted his philosophical subjugation of other animals.[23]

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[19] Immanuel Kant, *Prolegomena to Any Future Metaphysics* 75–76 (Oskar Piest ed., Liberal Arts Press 1951).

[20] Ayer, *supra* n. 18, at 34.

[21] Bartlett, *supra* n. 6, at 174.

[22] *Id.* at 175.

[23] Kant, *supra* n. 19, at ix. Descartes believed that animals were mere automatons, essentially natural machines incapable of feeling pain or of suffering, much like a clock. Because animals cannot reason, the argument goes, they have an inferior consciousness rendering them incapable of feeling pain. *See e.g.* Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 Am. J. Intl. L. 21, 25–26 (Jan. 1991) (pointing out that the Cartesian thesis is overinclusive since the only way we know that other humans feel pain is via others' external actions, and it is underinclusive since "[o]ur failure to converse with whales could well be a matter more of our own limitation than of theirs.").

Kant's dogma peaked in his repeated assertion that humans have a natural disposition toward metaphysical presupposition, that we have an inherent need to possess final answers, and "[t]here will, therefore, always be metaphysics in the world."[24] Kant's work makes it obvious that he was torn between the use of metaphysics and their condemnation.

If Kant is correct, then the traditional metaphysical presuppositions about us and other animals indicate a megalomaniacal disposition to possess omniscience. One might say that it was not God who made man in His image, but man who made God in *his* image. There is evidence of this in linguistics, as the etymology of the word "man" includes the Gothic "manna," related to the tribal deity, "Mannus."[25] Another root is the Sanskrit "manus," related to the Indian god, "Manu."[26] However, agnosticism need not be inculcated with anxious ambition to know everything. T.H. Huxley, discussing riddles of Christianity that cannot be answered with empirical evidence and the tendency of others to call him an "infidel" for being comfortable with his ignorance, responded, "[i]f any one will answer these questions . . . with something more to the point than feeble talk about the 'cowardice of agnosticism,' I shall be deeply his debtor. Unless and until they are satisfactorily answered, I say of agnosticism in this matter, '*J'y suis, et j'y reste.*'"[27] Incidentally, Huxley was both Darwin's bulldog and a speciesist.

It is possible to be comfortable with the fact that the human brain has limits, and that humans are even sometimes the inferior species. The Japanese Whaling Association (JWA) sardonically points out that the size of a whale's brain in proportion to its body is actually quite small, yet that is insignificant neurologically.[28] It nevertheless remains a controversy that whales are highly intelligent and that their natural ability to communicate is incredibly sophisticated, and not just in terms of pitch.[29] Whales and dolphins have developed interspecies

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[24] Kant, *supra* n. 19, at 116.

[25] Eric Partridge, *Origins: A Short Etymological Dictionary of Modern English* 375 (The Macmillan Co. 1966).

[26] *Id.*

[27] Thomas H. Huxley, *Science and Christian Tradition* 229–30 (D. Appleton & Co. 1896) (explaining that as long as the story and history of Jesus remain vague and inconsistent, agnosticism is "what I am, and what I remain").

[28] Japan Whaling Assn., *Questions & Answers*, "Whales," "Q3: Aren't whales supposed to have a high level of intelligence?" http://www.whaling.jp/english/qa.html (accessed Mar. 19, 2005).

[29] D'Amato & Chopra, *supra* n. 23, at 21 ("Whales speak to other whales in a language that appears to include abstruse mathematical poetry."); *see also* John Cunningham Lilly, *Man and Dolphin* 27 (Doubleday 1961) ("They emit whistles, creaking-doorlike noises, barks, grunts, rasping noises, etc.").

communicative abilities, "unlike man, whose ability to communicate with other species is rudimentary at best."[30]

At its inception in medieval Europe, modern secular law was considered, like its ecclesiastical predecessor, an imperfect effect of a divinely rooted natural law that was also *subject* to conscience and reason.[31] John Austin equated natural law to "Divine laws, or the laws of God, [or] laws set by God to his human creatures . . . ."[32] He said, furthermore, that some of God's laws were promulgated and others not, but that we nevertheless were bestowed with reason to discover this "natural religion" in its entirety.[33]

Mill analyzed the concept of divinely rooted natural law as it pertains to the creation of legal rights subsequent to comprehending moral rights. He said that people appear to have a disposition to see obligatory morality as a "transcendental fact," even objective since it cannot be interpreted.[34] If morality could be interpreted or created through human reason, there would be less incentive to be obedient. If a person were to realize that restraint is entirely a matter of her own conscience, a self-imposed feeling, she may come to the conclusion that her moral obligation ends as soon as she finds it inconvenient.[35] The belief that Mill's argument for the application of utilitarianism allows for fascism is erroneous,[36] but it is easy to understand the fear fostered by divorcing ethics from dogmatically inferred transcendental forces and relying purely on reason. Given the subjectivity of experience, relying on reason for moral judgment opens up the possibility that almost anything could be systematically justified, whereas using "permanent" doctrine as a moral basis gives more predictability. Regardless, Mill was correct in saying that the willingness to compromise morality does not depend on whether it is considered a transcendental fact.[37]

> The question, Need I obey my conscience? is quite as often put to themselves by persons who never heard of the principle of utility, as by its adherents. Those whose conscientious feelings are so weak as to allow of their

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30 David S. Lessoff, *Jonah Swallows the Whale: An Examination of American and International Failures to Adequately Protect Whales from Impending Extinction*, 11 J. Envtl. L. & Litig. 413, 413–14 (1996).

31 Harold Joseph Berman, *Law and Revolution* 273 (Harvard U. Press 1983).

32 John Austin, *The Province of Jurisprudence Determined*, in *Utilitarianism and On Liberty* 236, 236 (Mary Warnack ed., 3d ed., Blackwell Publg. 2003).

33 *Id.*

34 John Stuart Mill, *Utilitarianism*, in *Utilitarianism and On Liberty*, *supra* n. 32, at 205.

35 *Id.*

36 Mill says that "it is a misapprehension of the utilitarian mode of thought, to conceive it as implying that people should fix their minds upon so wide a generality as the world, or society at large. The great majority of good actions are intended, not for the benefit of the world, but for that of individuals, of which the good of the world is made up." Mill, *supra* n. 34, at 196. Mill also predicted that people would continue to misunderstand the word "utilitarianism." *Id.* at 185.

37 *Id.* at 205.

> asking this question, if they answer it affirmatively, will not do so because they believe in the transcendental theory, but because of the external sanctions.[38]

External sanction can come in the form of law. It can also come from informal sources. We are, after all, social animals and therefore look to one another for approval.[39]

It is irrelevant whether the genesis of law is the part of natural law that has not been promulgated and which we have discovered through reason. What is important is that law be coherent and convincing. Chen says that, "law is a continuing process of authoritative decision for clarifying and securing the common interest of community members. . . . Inherited rules are to be interpreted and applied not as autonomous absolutes but in light of the fundamental community policies they are intended to serve in contemporary contexts."[40]

Humanity's historically exploitative perspective of other animals has been said to be utilitarian in its purest form, blended with the Cartesian view that nonhumans are not sentient.[41] But Mill shared Bentham's more progressive and compassionate view of other animals.[42] The claim that subjugating other animals is "utilitarian" is a misuse of the word as Mill meant it. Though speciesism is prevalent in Mill's writings and has been the general attitude of most of his utilitarian successors,[43] he was adamantly opposed to the treatment of other animals as slaves and objects.[44] Furthermore, once we eliminate the claim of human superiority based on superior cognition, Mill's description of utilitarianism does not even require anthropocentrism.[45]

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[38] *Id.* at 206.

[39] *Id.* at 207.

[40] Lung-Chu Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* 13–14 (2d ed., Yale U. Press 2000).

[41] Bartlett, *supra* n. 6, at 157.

[42] Cass R. Sunstein, Remarks, *The Evolving Legal Status of Chimpanzees* (Harv. L. Sch., Cambridge, Mass., Sept. 30, 2002), in 9 Animal L. 1, 65 (2003).

[43] "Human beings have faculties more elevated than the animal appetites, and when once made conscious of them, do not regard anything as happiness which does not include their gratification." Mill, *supra* n. 34, at 187. However, Mill does not entirely agree with Epicureans who "have placed the superiority of mental over bodily pleasures chiefly in the greater permanency, safety, uncostliness . . . of the former . . . ." *Id.* He calls them "circumstantial advantages rather than in their intrinsic nature." *Id.* Most negatively he comments that "[f]ew human creatures would consent to be changed into any of the lower animals, for a promise of the fullest allowance of a beast's pleasures . . . ." *Id. See also* Henry Sidgwick, *The Methods of Ethics* 241 (7th ed., Macmillan & Co. 1930) (explaining that utilitarianism leaves unclear "whether we owe benevolence to men alone, or to other animals also").

[44] "What Mill was objecting to was that animals were treated as objects for the control and use of others, and the use of animals as objects is what Mill thought had to cease." Sunstein, *supra* n. 42, at 66.

[45] *Id.* at 65–72.

The main problem with Mill's utilitarianism is that he did not allow for morality to be based on any type of intuition,[46] for the same reason that Kant displaced humanity from nature. Neither person realized that humanity is part of and created in biology. The intuitive basis for morality is not entirely that which is purported by religious zealots,[47] but is subject also to what we call in other animals "instinct." For instance, Zane refers to one instinct of primordial humans: the "intense tendency in each individual to preserve [her] social community as an organization."[48] Surely some remnants of this instinct remain today, for example, in the form of human emotions that support natural sympathy.[49] Viewing ourselves as one of many primates, instead of viewing humanity as composed of transcendental beings somehow set apart from our evolutionary kindred, makes it easier to better understand our social behavior.[50] Our valuation a priori of an action, i.e., our morality, is determined not simply by our ability to reason, but also by the same biological mechanisms we use to explain the instinctive actions of other animals. These biological mechanisms may influence intuition as Mill referred to it and as it is commonly understood.[51]

Humans and nonhumans alike suffer from the orthodoxy that "the role of law and the role of rights is to elevate, to bring us up above the law of nature."[52] Separating law from nature, or attempting to rise above nature, reflects a predicament arising from what we have misnamed "social Darwinism," and is ill-conceived. Darwin's discoveries were not of a brutish "might make[s] right" natural world, as our Hobbesian psychological associations have misinterpreted.[53] Darwin saw an interdependent society of organisms that includes humans.[54]

B. Evolutive Science, Evolutive Law

No claim referring to a reality that supersedes the boundaries of sense-experience can be taken literally.[55] The reason for such a radical

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[46] Mill says intuitive ethics is virtually synonymous to inductive ethics, which requires general laws that are ultimately contrived. Mill, *supra* n. 34, at 182.

[47] *Id.*

[48] Zane, *supra* n. 4, at 12.

[49] *Id.* at 14.

[50] Frans De Waal, *The Ape and the Sushi Master: Cultural Reflections of a Primatologist* 120 (Basic Books 2001).

[51] *Id.* at 55.

[52] Alan M. Dershowitz, Remarks, *The Evolving Legal Status of Chimpanzees* (Harv. L. Sch., Cambridge, Mass., Sept. 30, 2002), in 9 Animal L. 1, 59 (2003).

[53] The anthropologist Haviland comments that humans have not always had such a cynical perspective and that "detailed studies have revealed that life in food foraging societies is far from 'solitary, poor, nasty, brutish, and short.'" William A. Haviland, *Cultural Anthropology* 167 (9th ed., Harcourt College Pub. 1999) (quoting Thomas Hobbes, *Leviathan* 104 (J.M. Dent & Sons, Ltd. 1950)).

[54] Dershowitz, *supra* n. 52, at 59; *see also* Charles Darwin, *On the Origin of Species* ch. 3 (Harv. U. Press 1975) (available at http://www.classicreader.com/read.php/sid.1/bookid.107/sec.20) (giving several examples of "how plants and animals, remote in the scale of nature, are bound together by a web of complex relations").

[55] Ayer, *supra* n. 18, at 34.

statement, given that international law is traditionally based on the natural law approach,[56] is that super-empirical inferences ignore or reject knowledge and experience we have gained without the use of metaphysics.[57] This is not meant to suggest that sight, smell, touch, taste, and hearing are the only mechanisms available for learning, but if we intend to use knowledge to create law, we should at least *begin* with information obtained using these senses. Practical reasons demand that we give precedent to science-based knowledge as guidelines for morality or law, using metaphysics only as a supplement.

First, empirical science is evolutive. It is evident in more than just the metaphysical justification for speciesism that international law has not evolved in conjunction with science. Fouts even goes so far as to say that the state of law is such that we need a legal version of Kepler, who helped Europe eradicate its belief in geo-centrism, to incorporate the biological reality of species continuity into the legal system so that it will no longer suffer from "Cartesian delusions."[58]

One dilemma of legal systems is their inherent conservatism, but this can be overcome by keeping legal foundations fluid and coherent.[59] Metaphysical foundations, like canon law or natural law, are neither fluid nor coherent to modern society, whereas the empirical sciences remain open systems of belief that are always subject to revision upon new information.[60] Empirical sciences have evolved to realize the speciousness of such concepts as Aristotle's chain of being, placing white men just below angels and just above white women and non-white people.[61] Science has helped us determine that famine is usually human-caused,[62] that we have altered seventy-three percent of the Earth's habitable land,[63] have degraded seventy-five percent of the Earth's dry lands, extracted twenty percent of the water from the Earth's rivers, and have severely altered sixty percent of the Earth's major river basins.[64]

Second, empirical science-based law would be founded on collective knowledge. As such, it would be easier to find consensus in international forums, for one, because a scientifically-based opinion would

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56 Chen, *supra* n. 40, at 12.

57 Ayer, *supra* n. 18, at 33–34.

58 Roger S. Fouts, Remarks, *The Evolving Legal Status of Chimpanzees* (Harv. L. Sch., Cambridge, Mass., Sept. 30, 2002), in 9 Animal L. 1, 16 (2003).

59 Chen argues for a "policy-oriented" approach to international law, which realizes law as "an ongoing process of authoritative decision in which many decision makers continually formulate and reformulate policy." Chen, *supra* n. 40, at 14.

60 Bartlett, *supra* n. 6, at 151.

61 Stephen M. Wise, Remarks, *The Evolving Legal Status of Chimpanzees* (Harv. L. Sch., Cambridge, Mass., Sept. 30, 2002), in 9 Animal L. 1, 21.

62 David Marcus, *Famine Crimes In International Law*, 97 Am. J. Intl. L. 245, 250 (Apr. 2003).

63 G. Tyler Miller, Jr., *Environmental Science* 84 (6th ed., Wadsworth Publg. Co. 1997).

64 James Gustave Speth, *Red Sky at Morning: America and the Crisis of the Global Environment (A Citizen's Agenda for Action)* 31–32 (Yale U. Press 2003).

help avoid the charge of subjectivism.[65] Legal opinions based on science also control for partiality resulting from diverse cultures. For example, principles of biology apply to everyone regardless of or even despite philosophy or religion. This ambition for automatic consensus was undoubtedly one reason for the Agreements on Sanitary and Phytosanitary Standards (SPS),[66] but they remain an anomaly and were created for a very narrow purpose. The SPS agreements allow measures to protect all animals, based on Article XX(b) of the General Agreement on Tariffs and Trade, and require that they be based on accepted international standards.[67] International standards for protection of nonhumans do not bode well.

Science certainly is manipulated for political reasons, especially in cases when powerful political constituencies have an interest one way or another. However, political manipulation is less likely when the vast majority of the international scientific community agrees, such as when 2,500 scientists in the International Panel on Climate Change came to the conclusion that humans are causing global warming.[68] Though the international response is deterred by politics, references to science will eventually be helpful. If the Kyoto Protocol claimed that global warming was a result of God blowing hot air over the planet, we would have much further to advance before signing onto something better than fractional reductions of greenhouse gases based on 1990 levels.[69] Similarly, when incorporating a metaphysically- or tautologically-based human chauvinism, anthropocentric environmental treaties more easily disregard the basic needs of other species and undermine their importance to us. Hence, the door is opened to further destruction of ecosystems, and rendering treaties themselves moot and ineffective. The Kyoto Protocol virtually ignored the effects of climate change on other animals, despite the fact that healthy biodiversity is the best indicator of ecosystem integrity.[70]

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[65] *See* George C. Freeman, *Liberalism and the Objectivity of Ethics*, 47 La. L. Rev. 1236 (May 1987) (discussing objectivism and subjectivism).

[66] Raj Bhala, *International Trade Law Handbook* 333–41 (2d ed., Matthew Bender 2001).

[67] *Id.* at 333.

[68] Eban Goodstein, *Economics and the Environment* 6 (2d ed., Prentice-Hall, Inc. 1999); Mark Henderson, *Scientists Claim Final Proof of Global Warming*, The Times, Health News 4 (May 6, 2004) (available at http://www.timesonline.co.uk/article/0,,8122-1100073,00.html).

[69] Speth, *supra* n. 64, at 64.

[70] *See Kyoto Protocol to the United Nations Framework Convention on Climate Change* (Dec. 11, 1997), http://unfccc.int/resource/docs/convkp/kpeng.pdf; David Suzuki & Amanda McConnell, *The Sacred Balance: A Visual Celebration of Our Place in Nature* 6 (Greystone Books 2002) ("Diversity reveals itself to be the strategy for survival—diversity of genes within species, species within ecosystems, and of ecosystems around the planet—for as changes occur, life's resilience depends on the pool of differences from which new gene, species, and ecosystem combinations might flourish under the altered conditions.").

Finally, a legal foundation in empirical science will help international law become more interdisciplinary and comprehensive.[71] Mill saw one reason that law should be formed with the aid of all the sciences: those which we commonly accept as the "first principles of a science" are actually the "last results of metaphysical analysis . . . ."[72] If chemists and biologists did not share actively their discoveries, we still might not see the connection between feeding dead cows to live cows and New Variant Creutzefeldt-Jakob disease in humans, which has the same symptoms as Alzheimer's.[73]

Until recently, the metaphysical presupposition that humans are not animals has inhibited the interplay between human psychology, anthropology, and sociology with primatology and biological evolution—and vice versa. Assumptions of spiritual differences between chimpanzees and humans have rationalized horrible experiments on chimps, and these assumptions have also impeded more profound analysis of the roots of human social interaction, morality, and culture.[74] Discussing the political theory of Karl Popper, Mario Vargas Llosa says that "[i]f we do not subject truth—all the truths—to the test of trial and error, if we are not free to question . . ., the mechanics of knowledge is shackled and knowledge itself is perverted."[75] While individual sciences may now suffer less from tunnel vision and self-defeating conservatism,[76] international law continues to be molded as if Darwin's ship, the *Beagle*, had been lost at sea. International human rights still are defined by Aristotle's *scala naturae*.[77] Therefore, the less human an animal is, the less likely it is that it will be protected.

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71 "The science of law, if there is such a science, is but one of the several sciences that are concerned with men living in a social State. Sociology, ethics, politics, political economy, as well as history, biology and psychology, all have a common ground, for they are all more or less related to each other, and all are necessary to a proper understanding of each science." Zane, *supra* n. 4, at 2.

72 Mill, *supra* n. 34, at 181.

73 Alan Clark, *St. John's Health System, Mad Cow Disease (BSE)*, http://www.stjohns.com/healthinfo/articledetail.aspx?article_id=33 (updated Mar. 6, 2003).

74 *See generally* De Waal, *supra* n. 50 (describing how human conceptions of morality are the product of millions of years of evolution; that morality is fundamentally an element of culture; that other primates, elephants, and even birds demonstrate through visual art, musical improvisation, and other creative preferences that humans are not the only animals to exude culture, based on conventional sociological definitions of the word; that nonhuman animals display a comprehensive network of subjective expectations in relationships between individuals).

75 Mario Vargas Llosa, *Updating Karl Popper*, 105 Publications of the Modern Lang. Assn. 1018, 1019 (Jonathan Tittler trans., Oct. 1990).

76 Though not entirely. Adelman discusses statistics, which consist of "certain mathematical theorems and models of scientific inference that are premised on substantive beliefs about nature." David E. Adelman, *Scientific Activism and Restraint: The Interplay of Statistics, Judgment, and Procedure in Environmental Law*, 79 Notre Dame L. Rev. 497, 505–06 (2004).

77 Fouts, *supra* n. 58, at 19–21.

III. EXCLUSIONARY HUMAN DIGNITY

The most commonly stated basis for human rights is the idea that humans are special because they are not other animals, whether in reference to human dignity or otherwise.[78] The flawed philosophical and scientific argument for speciesism thus negates the current legal basis for human rights. This is one reason why questioning the basis for human rights may not seem like a good idea, since we have still so far to progress in protecting women, the poor, and indigenous peoples. As long as the legal rights exist, it does not matter how. On the other hand, basing human rights on flawed reasoning may also inhibit the progression, legitimacy, and long-run perspective of international human rights law. Furthermore, absent a legitimate claim to human supremacy, this type of human rights is antithetical to the fundament that the law emulates justice.

A. Dignity without Merit

The concept of human dignity need not imply speciesism. Dignity is synonymous with respect or worth.[79] If one feels dignified as a man, it is not based on denigration of women. If one feels dignified as a human, it is not because he feels superior to nonhumans. Perhaps it results from the psychology of habitual subjugation of other species that causes us to define our worth based not on what we are, but what we are not. Ironically, this also indicates that we identify with other species in some way. The Author will call this "exclusionary human dignity."

Exclusionary human dignity has been a historically fickle concept,[80] trying the minds of moralists and philosophers who have attempted to provide a permanent definition for what is basically an idea that one day will disappear with or without us. The result has been two general perspectives of dignity. First, there is dignity as empowerment, which is the view espoused by the International Covenant on Civil and Political Rights (ICCPR)[81] as well as discourse suggesting

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[78] Mutua claims that a universal notion across all societies is that humans deserve special protections for the simple reason that we are not "animals." Makau Mutua, *The Banjul Charter: The Case for an African Cultural Fingerprint* in *Cultural Transformation and Human Rights in Africa* 79 (A.A. An Na'im ed., Zed Books 2002). Cohen states that "any human being granted personhood has rights by virtue of species membership." Ronald Cohen, *Endless Teardops: Prolegomena to the Study of Human Rights in Africa*, in *Human Rights and Governance in Africa* 3, 4 (Ronald Cohen, Goran Hyden & Winston P. Nagan, eds., U. Press of Fla. 1993).

[79] *Webster's New World College Dictionary* 385 (Victoria Neufeldt ed., 3d ed., Macmillan 1997).

[80] Roger Brownsword, *Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the "Dignitarian Alliance,"* 17 Notre Dame J.L. Ethics & Pub. Policy 15, 21 (2003).

[81] Article 1(1): "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development . . . ." *International Human Rights Documents*, *supra* n. 1, at 64.

that a right to development may be emerging in international law, which would entail access and power over economic resources.[82] This view of exclusionary human dignity appeals to the idea of free will and autonomy.

Contrarily, the second view is dignity as restraint, which avers that human value is a metaphysical "good" that cannot be debased for any reason.[83] A typical example in international law is Article 2 of the Convention on Human Rights and Medicine, which stipulates that "[t]he interests and welfare of the human being shall prevail over the sole interest of society or science,"[84] even if it does not compromise autonomy or free will.[85] Dignity as restraint creates the duties[86] expounded by the International Covenant on Economic Social and Cultural Rights,[87] and possibly the emerging rights of indigenous peoples. Both of these views of exclusionary human dignity are supported by Kant, who said,

> Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being . . . but must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world that are not human beings and yet can be used, and so over all things.[88]

Contrary to philosophy professor Michael Meyer's opinion, the Kantian view of human dignity is definitively speciesist because Kant determines human dignity to be rooted in what are typical human traits. Meyer explains that, although Kant does not define human dignity based on being human, he bases dignity on "rational capacity," which is of course determined by Kant's and Meyer's own rational capacity. Meyer does not believe such reasoning is species-based because, as he explains of Kant's philosophy, "it is not in fact the case that all humans have this capacity."[89] As a hypothetical analogy, one could espouse "white dignity" based on the typical traits of a white person. Certainly this is racist, even if a fair-skinned, straight-haired African may incidentally be more dignified than a dark skinned, curly-haired European. In the same vein, the Kantian view of speciesism is not opposed to the idea of developing rudimentary rights for nonhumans who possess "humanlike" qualities in terms of morphology, sentience, or cogni-

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82 Roland Rich, *The Right to Develop as an Emerging Human Right*, 23 Va. J. Intl. L. 287 (1983).

83 Brownsword, *supra* n. 80, at 25–28.

84 *International Human Rights Documents*, *supra* n. 1, at 265.

85 *See id.* at 267 ("The creation of human embryos for research purposes is prohibited."); Brownsword, *supra* n. 80, at 17–18 (with regard to cloning).

86 *Brownsword*, *supra* n. 80, at 32.

87 *See e.g. International Human Rights Documents*, *supra* n. 1, at 81 (Article 1(2) states, "[i]n no case may a people be deprived of its own means of subsistence.").

88 Brownsword, *supra* n. 80, at 27 (quoting Immanuel Kant, *The Metaphysics of Morals* 209 (Mary Gregor ed., trans., Cambridge U. Press 1996)).

89 Michael Meyer, *The Simple Dignity of Sentient Life: Speciesism and Human Dignity*, 32 J. Soc. Phil. 115, 121 (2001).

tion. In fact, this is exactly what is happening in international law with other primates, whales, and elephants.[90]

Because basing human dignity on humanness presents a problem for law and logic, Roger Brownsword argues for a more rigorous approach:

> To say that humans have dignity, meaning that humans have a value, simply by virtue of being members of the human species will not convince even fellow humans. For, any attempt to privilege the members of a particular species, including the members of the human species, merely by virtue of their species-membership will attract the charge of "speciesism"—such a response is arbitrary and it plainly will not do.[91]

Instead he says the basis for dignity should be "agency,"[92] but this basis fails too, because his description of agency is still based on what he perceives as humanness. Referring to the bioethicist John Harris, Brownsword says human dignity results from our distinctive qualities that enable us to value our existence.[93] First, we are dignified because we can make autonomous judgments about our existential value. Second, we thus have the mental capability to overcome our genetic programming and commit suicide. Third, human dignity implies respect

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[90] *See e.g.* D'Amato & Chopra, *supra* n. 23. While D'Amato fails to adequately analyze human rights, he contends, however, that "[i]nternational law can no longer be viewed as an artifact exclusively concerned with state and human interactions against a mere background called the environment. Rather, other living creatures in the environment are players in a new and expanded international legal arena." *Id.* at 50. Further, he says that:

> [W]hales and some other sentient mammals are entitled to human rights or at least to *humanist rights*—to the most fundamental entitlements that we regard as part of the humanitarian tradition. They are entitled to those fundamental rights not because they [are] "less" than human but because they are "different" from humans in various respects that do not affect or qualify the rights in question.

Id. at 27 (emphasis in original). The International Whaling Commission's (IWC) 1946 charter protects whales specifically for the purposes of maintaining "stocks" for industry, however, since the 1970s membership has come to be dominated by non-whaling countries, many of which were recruited by Greenpeace. Therefore, despite scientific opinion that lifting restrictions on killing minke whales was economically viable, the IWC has upheld the ban. D'Amato believes the change of heart in the IWC is the result of an emerging right to life for whales, a stance bolstered by coinciding bans by former whaling states, such as Australia. *Id.* at 22–23, 46, 49. In 1988, Kenya's president ordered that poachers of elephants be shot immediately. What compounds the significance of this decision was that the international community supported Kenya's decision as a matter of elephant conservation. *See e.g.* Michael Glennon, *Has International Law Failed the Elephant?* 84 Am. J. Int. L. 1, 15–16 (Jan. 1990) (discussing international legal strategies for protection of elephants); *see also* Robert E. Goodin, Carole Patemand & Roy Pateman, *Simian Sovereignty*, 25 Political Theory 821, 833–37 (Dec. 1997) (arguing for giving this highest right, the right to sovereignty, to humans' closest genetic relatives in order to protect nonhuman primate habitat, a groundbreaking idea given the anthropocentric history of sovereignty).

[91] Brownsword, *supra* n. 80, at 22.

[92] *Id.* at 24–25.

[93] *Id.* at 22.

for a person's autonomous judgment as to whether she or he will live or die.[94] Therefore, humans must have, at the very least, a basic right to life.

When we consider that individuals of other species sometimes autonomously make decisions concerning their own lives, whether out of depression or otherwise, this basis for exclusionary human dignity should crumble. With a speciesist mentality it would be easy to discount depressive behavior observed in other animals, such as when stressed elephants get drunk by eating fermented fruits and grains.[95] But if there was any question before, we have also conducted laboratory experiments inflicting trauma on nonhuman animals, demonstrating a "clear conclusion . . . that humans are not alone in exhibiting self-initiated behaviors that ultimately produce self-harm or death."[96] So, how do the bioethicists respond? Simply that humans value their existence *more profoundly* than do other species because of many uniquely human traits.[97] In other words, the speciesist response will remain dogmatic and tautological.[98]

Ruth Cigman claims that "death is not, and cannot be, a misfortune for any creature other than a human."[99] Cigman refutes that nonhumans should have even a basic right to life based on the following. The "range" of suffering is greater in humans. Humans have a greater capacity to desire not to die. Behavioral expression in humans indicates more profound mental experience. Loss of opportunities for accomplishment in life by humans is greater upon dying. Nonhumans blindly cling to life, while humans want to live because they value life. Therefore, nonhumans do not have a right to life, because of their incapacity to have categorical desires. Finally, she states that though "[a]ll human beings are human beings" is a tautology, it is a useful one.[100]

The most important problem with Cigman's argument is that she never defines "rights." She appears to rely on a conception of moral rights as metaphysical privilege, which humans have the power to grant upon themselves and others. Not only is this an apparent contra-

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[94] *Id.*

[95] Glennon, *supra* n. 90, at 3 (citing Rodger Yeager & Norman Miller, *Wildlife, Wild Death: Land Use and Survival in Eastern Africa* 115 (1st ed., State U. of N.Y. Press 1986)).

[96] J. N. Crawley et al., *Animal Models of Self-Destructive Behavior and Suicide*, 8 Psych. Clinics of N. Am. 299, 308 (Alec Roy ed., W.B. Saunders Co. June 1985). For further reading on behavior of nonhumans in response to stress, see Ted Friend, *Behavioral Aspects of Stress*, 74 J. Dairy Sci. 292, 297–301 (1991) (from the Response of Animals to Stress Symposium).

[97] "It is a distinctive characteristic of an ideology that it resist refutation. If the foundations of an ideological position are knocked out from under it, new foundations will be found, or else the ideological position will just hang there, defying the logical equivalent of the laws of gravity." Peter Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* 220 (2d ed., Avon 1990).

[98] *Supra* pt. I.

[99] Ruth Cigman, *Death, Misfortune and Species Inequality*, 10 Phil. & Pub. Affairs 47, 47 (Winter 1981).

[100] *Id.* at 49–60.

diction but she mistakenly takes for granted the connection to legal entitlement. Second, assuming her argument was backed by data of other animals' experiences (and it is not), her logic falls short of explaining why these alleged differences exclude other animals from holding rights. She makes a universalist claim about the ascription of morality to species and bases her claim on a teleological argument—even tacitly deist. Third, she never decides upon objective criteria for determining which characteristics of a species to value most. The criteria she discusses are those she believes to be uniquely human, the same circular justification for speciesism used by Kant, Meyer, Brownsword, and Harris. Cigman subtly argues that human cognitive ability makes us more worthy of existence than all other animals.

In the grand history of biology it is illogical to "rank" today's terrestrial inhabitants using such a basis that is ephemeral and so often in direct opposition to nature. If we seek logical rigor, rather than human cognition, it seems much more objective to rank species based on aspects that are more universal throughout the history of the biosphere, like perhaps genetic robustness. At the same time, the contrivance of ranking species underlies the ridiculousness of the conception "moral superiority," which succeeds mostly to rationalize our regrettable relationships with other animals.

But bases for human rights need not be exclusionary. There exist other foundations for human rights, and we can refer to many reasonable purposes to create legal protections even solely for anthropocentric reasons. For example, human rights can engender harmony in society. Is this not their purpose? We need not refer to seemingly relevant yet ephemeral concepts or subjective metaphysical philosophies to justify human rights. Part II of this article explained how John Stuart Mill has been misunderstood. Utilitarianism refers not to subjective utility but *objective* utility—utility based on democracy, consensus, knowledge, and health.[101]

It would help the claim that the distinctive faculties of human consciousness, laconically called "the power to reason," render us the most dignified animal on the planet if we were able to provide objective evidence. In short, we must shirk the use of projective misconstruction.[102] If human dignity is in relation to other species (i.e., exclusionary), that means we must deserve respect from other species. Unfortunately, unlike whales, we cannot ask other species if there are qualities of humans that other species esteem. It is reasonable that law should not make assumptions about this, especially if giving us or other animals the benefit of the doubt results in atrocity to us or them. Another objective way to determine human dignity is to take a holistic, or ecocentric, point of view. Is there historical evidence that our ability to reason has been at least helpful to the Earth's inhabitants or Earth herself? What we call our greatest achievements—such as architecture, harnessing

[101] Mill, *supra* n. 34, at 205–09.

[102] Bartlett, *supra* n. 6, at 175.

nuclear energy, e-communication—have been phenomenal, but they are not evidence that we are dignified vis-à-vis other animals. Human technology has lowered infant mortality, increased longevity, conquered pandemic disease and simultaneously bettered our ability to use more natural resources per person. While this may be great for humans in the short term, by and large human reason appears to have contributed mostly in a negative way to ecosystem integrity. Hawkin states that "[t]oday human activities are causing global decline in all living systems."[103] Hence, in the last few decades international environmental law and the principle of sustainability have materialized to address industrialized environmental exploitation causing widespread ecosystem collapse.[104]

To develop nonhuman animal rights, international law should incorporate the following precepts: Biological evolution did not end with humanity, and biological evolution has no clear purpose. Humanity is a part of biodiversity, and we rely upon its integrity. The ecological footprint of humanity is far greater than that of all other animals. Thus, our governing systems must recognize other animals more profoundly than their systems recognize us. Finally, human law must not find its philosophical basis in the exclusion or subjugation of nonhuman animals.

IV. CONCLUSION

Human reason is a potent asset, and it can be terrestrially beneficent—but only if we convince ourselves to stop using it maleficently. If Mill were alive today, arguing non-speciesist Neo-Utilitarianism, he might reiterate that the Earth's evolving legal system is suffering from the tyranny of the majority. "Society collectively" is imposing its tyranny over "the separate individuals who compose it."[105] Protection will require "protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices . . . to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways . . . ."[106]

The logic of Kant and Mill has been useful to our understanding of the shortcomings of natural law, but it has not contributed to a better understanding of the natural world. Their views of other animals are the typical justification for speciesism in international law, as represented by treaties, declarations, and the writings of academics. Upon analysis, the tacit justifications for speciesism in international law are all non sequitur. Speciesism reflects the backwardness of law in that it

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[103] Paul Hawkin, Amory Lovins & L. Hunter Lovins, *Natural Capitalism: Creating the Next Industrial Revolution* 149 (Little, Brown & Co. 1999).

[104] Gwendellyn Earnshaw, *Equity as a Paradigm for Sustainability: Evolving the Process toward Interspecies Equity*, 5 Animal L. 113, 114 (1999).

[105] Mill, *supra* n. 34, at 90.

[106] *Id.* at 91.

has not adequately integrated modern qualities of science, namely to be evolutive, to exhaustively refer to empirically-deduced collective knowledge, and to be interdisciplinary. In his book, *The Health of Nations*, Philip Allott says, "[t]he reality of the human world is a species-specific reality made by human beings for human beings."[107] International law retains the archaic notion that humanity transcends the biosphere. Allott says he is terrified of accepting that "knowledge, mind, and meaning are part of the same world that they have to do with."[108] However, elevating ourselves to god-like status creates a moral hazard for the way we relate to each other and all other life. Was that not the lesson of our brush with fascism? In international law, the victory of compassion will not be in expanding the circle of human rights, but in redefining their foundation. Human dignity will remain a misnomer as long as it is defined in exclusionary terms.

[107] Philip Allott, *The Health of Nations: Society and Law beyond the State* 3 (Cambridge U. Press 2002).

[108] *Id.* at 20 (quoting W.V. Quine, *Ontological Relativity*, in Quine, *Ontological Relativity and Other Essays* (Columbia U. Press 1969)).