

ARTICLES

ANIMAL DIGNITY

By
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The aim of this Article is to find a broader theoretical basis for animal protection than the current ideas of personhood and capabilities provide. Human dignity is variously defined but pervasive in grounding human rights and should have a counterpart for animal protection beyond minimum welfare that can improve the quality of animal lives overall. Dignity has an inward dimension based on the value of an individual that should not be violated and an outward aspect in the individual's bearing to the world, both of which apply to animals. In content, human individuals have dignity in autonomously directing their lives, having a sense of self as separate but in relationship with others, and experiencing continuity of past, present and future as integrity over time. For many, human dignity requires moral agency, or the ability to follow principles and values and to restrain one's behavior. Dignity does not require consciousness of its presence. A person's dignity can be defiled without that person's awareness, as in infants and mentally incapacitated people. Using recent research from ethology, the study of animal mentation, this Article posits that none of the attributes that define human dignity differs essentially for animals, even though concepts of animal dignity would have to capture the richly diverse traits and personalities of animals. The Article presents a highly individualized and contextualized notion of animal dignity that goes beyond normal species function and capacities and is flexible enough to recognize the dignity in an animal acting out of character in ways that exceed expected norms for its kind. It illustrates some of these remarkable dignities through animal stories peppered throughout. To provide some contextual applications of the animal dignity idea, it considers specifically how dignity might apply to captive animals as pets, in entertainment, on hunting ranches, in research (especially biotechnology), and on the farm. The author intends to elaborate this concept of dignity for animals in the wild in a follow-up paper.

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I. INTRODUCTION

Meaningful words are often hardest to define. Loyalty and beauty share with dignity an elastic quality that invites plural meanings and inconsistent applications. That someone has dignity may seem more a conclusion than a meaningful constraint. The concept of dignity appears in international political documents and law, as a foundation of human rights, or a right itself.¹ Human dignity encompasses multifac-

¹ See, e.g., GRUNDGESETZ [GG] [BASIC LAW] [CONSTITUTION], art. 1(1) (Ger.), *translation* at http://www.gesetze-im-internet.de/englisch_gg/index.html (declaring Germany's intention to respect and protect human dignity); S. AFR. CONST., 1996, art. 10 (recognizing inherent human dignity and declaring its intention to respect and protect such dig-

rious and overlapping ideas not all of which are consistent: a universal human characteristic or value that commands equal respect of individuals no matter their merit,² the bearing or stature of someone who excels or has high position,³ a non-degrading manner of presenting oneself to the world,⁴ the capacity for autonomous direction over one's life in rational agency and self-reflection,⁵ and the ability to deliberate on moral matters and guide action accordingly.⁶ Some have attributed the dearth of theoretical analysis of dignity in modern philosophy to the perceived inherent contradictions within the idea or its vacuous invocations.⁷ The dignity idea is both pertinent to *Homo sapiens* as a species and individual humans, both universal and particular, and about both inherent and earned traits. The meaning of human dignity as universal and intrinsic surfaced prominently after World War II, presumably in response to Nazi and Stalinist crimes against humans and humanity as a whole.⁸ According to that notion, all individual humans equally possess dignity simply by virtue of belonging to the species *Homo sapiens*, including grievous offenders of social norms.⁹

nity); U.N. Charter pmbl. (reaffirming faith “in the dignity and worth of the human person”); European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (recognizing the “inherent dignity of all human beings”); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948) (recognizing the “inherent dignity . . . of all members of the human family”).

² See, e.g., GEORGE KATEB, HUMAN DIGNITY 29–30 (2011) (stating that inherent in human rights is that each human must be treated equally); JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 31 (2012) (conceiving of egalitarian dignity).

³ See, e.g., MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 47 (2012) (noting the historical use of dignity “to denote the bearing required by a differentiated status hierarchy”); WALDRON, *supra* note 2, at 22, 30, 53, 96 (describing dignity in relation to stature and nobility).

⁴ See ROSEN, *supra* note 3, at 34–35 (describing dignity as aesthetic presentation).

⁵ See, e.g., KATEB, *supra* note 2, at 14 (relating dignity to free agency); JONATHAN SACKS, THE DIGNITY OF DIFFERENCE: HOW TO AVOID THE CLASH OF CIVILIZATIONS 79 (2003) (discussing the change in philosophical thought to that of free agency); WALDRON, *supra* note 2, at 20 (describing dignity in relation to humans as “normative agents”).

⁶ See e.g., KATEB, *supra* note 2, at 13 (describing Kant’s moral philosophy, which theorizes that human dignity is tied to humans’ “unique capacity” to “act from the correct moral disposition”); ROSEN, *supra* note 3, at 25–26 (establishing a link between dignity and moral autonomy); SACKS, *supra* note 5, at 79–80 (discussing the change in philosophical thought to the ability to deliberate on moral matters and guide action accordingly).

⁷ See, e.g., Ralf Stoecker, *Three Crucial Turns on the Road to an Adequate Understanding of Human Dignity* (discussing perceived incoherence of the idea and supporting a “negative” approach to violations of dignity as a starting place for analysis), in HUMILIATION, DEGRADATION, DEHUMANIZATION: HUMAN DIGNITY VIOLATED [hereinafter VIOLATED] 7, 9 (Paulus Kaufmann et al. eds., 2011).

⁸ See, e.g., KATEB, *supra* note 2, at 87 (noting how the modern concept of dignity was shaped by the atrocities of the twentieth century); ROSEN, *supra* note 3, at 1–2 (noting the “vital role” of dignity in the United Nations’ Universal Declaration of Human Rights and the Basic Law of the Federal Republic of Germany, two “fundamental documents” of the late 1940s).

⁹ See, e.g., KATEB, *supra* note 2, at 29–31 (describing dignity as an absolute right, one every human being is entitled to hold).

Growing awareness of abhorrent historical and current human exploitation of nonhuman animals raises the question whether these animals also possess a dignity that morally constrains how humans may treat them.¹⁰ If every human being is entitled to dignified treatment, should other animals receive similar consideration? Many have argued that dignity belongs only to humans, setting them apart because of their special traits.¹¹ Are the characteristics that supposedly set humans apart, including complex reasoning, language, long-range memory, a view of the future that generates a sense of integral identity over time, and moral agency sufficiently distinctive to withhold dignity from nonhuman animals? Given increasing understanding of common origins of life, evolutionary continuity, shared physical neurobiological and genetic features, and ethological knowledge of animal lives as conscious, richly emotional, and purposive, it is time to examine animal dignity more thoroughly as a basis for change in law and public attitudes.¹²

In this Article, I argue that animal dignity is a vital moral and legal idea that should be given specific content and brought to the forefront of dialogue on nonhuman animal treatment. I examine animal dignity as governing mostly animal and human relationships, although I recognize that animals may also possess dignity in relation to other animals. I claim that, taken seriously, the idea would significantly constrain *most* animal practices that humans take for granted even if dignity in humans and animals is not equivalent.

I accept that the significance of dignity as a normative constraint varies among species, according to needs and capacities, and that species' attributes are highly relevant to animal treatment.¹³ I argue, however, that a capacities approach provides a forward-looking set of guidelines only for a limited number of species that are well understood, and that its ethical relevance pertains mostly to preventing animal harm and designing conditions for animal flourishing. Dignity for existing animals, however, is ultimately a particular judgment about a situated individual, considering such specific factors as where the animal lives, the extent of its interaction with other animals, its developmental history, habitat opportunities and limitations, age, health, and the extent of its dependency on humans. Two living ani-

¹⁰ For convenience only, I use the term animals as shorthand for nonhuman animals, recognizing that humans also belong to the biological Kingdom Animalia.

¹¹ See, e.g., KATEB, *supra* note 2, at ix–x, 3–6 (distinguishing human dignity from animal dignity); GIOVANNI PICO DELLA MIRANDOLA, ORATION ON THE DIGNITY OF MAN 3–4, 7–8, (A. Robert Caponigri trans., 1956) (1486) (noting that the unique traits of humans as setting them apart from other beings); Manfred Nowak, *Foreword to VIOLATED*, *supra* note 7, at v (saying dignity is meant to distinguish human beings from creatures).

¹² Although animal advocates mention dignity, they do not specifically elaborate on the idea or show how it could influence ethics or law.

¹³ See MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 325–407 (2006) (espousing the notion that dignity varies according to species' different capacities).

mals sharing membership in a species may have starkly different dignity demands because the ‘normal’ capacities for the species are too general and sometimes meaningless in individual cases. Even ‘wild’ animals may be under intensive human management for conservation or control purposes, captive in zoos and aquatic facilities for breeding and research, exhibited in entertainment venues such as circuses and rodeos, and killed for food and other products useful to humans. The typical species traits and flourishing of such animals have limited meaning to animal dignity across such diverse circumstances. The operational implications of individual animal dignity are always relational and contextual despite the relevance of species-based characteristics to public policy and law. Yet, I argue that violations of individual animal dignity can sometimes involve the dignity of other members of a group, population, or species, making it meaningful to speak of collective dignity. Dignity provides useful legal and ethical guidance for resolving some conflicts between existing animals and humans.

I begin with human dignity as a framework, deciding what components might or might not apply to animals and what additional features animal dignity presents. The ideas of conscious agency, autonomy, deliberative morality, integrity, and privacy are prominent in discussions of human dignity and are explicitly touted as setting humans apart from all other species. To use animal advocacy terminology, the notion of human dignity is explicitly ‘speciesist’ in explicating the idea with features belonging only to humans and rendering *Homo sapiens* superior.¹⁴

I take the uniqueness claim to be well refuted through ethology and other scientific research demonstrating that many nonhumans have richly conscious and self-conscious experiences, have a sense of self continuing through time, solve complex and varied problems, design and employ tools, transmit learned and cultural knowledge to their young, and show many other capacities that support dignity. I inject some of those findings into the comparative discussion of the human and animal attributes of dignity, but I cannot do full justice to the large and growing literature except through brief and illustrative references. Also in illustration, I use plentiful animal stories. These are fascinating, but also are a source of understanding. Of course anecdotes are idiosyncratic and lack empirical significance. They function well in expanding appreciation for the remarkable range of individual animal behavior and enlarging empathy. Taken together, they also show in a direct way why nonhumans deserve greater moral, legal, and

¹⁴ Richard Ryder invented this now-familiar term in the 1970s, and Peter Singer made the term famous; see PETER SINGER, ANIMAL LIBERATION 6 n.4 (1975) (acknowledging debt to Ryder for the term).

scientific attention. Stories prompt further study. According to ethologist, Marc Bekoff, “the plural of anecdote is data.”¹⁵

I borrow from the literature on human dignity a two-sided analysis, viewing dignity with both inward dimensions related to individual identity, as well as an external dimension related to the outward presentation of a worthy self to the world.¹⁶ The personal dimension is the basis of dignity as a value, while the outer aspect demands respect for claims or rights to non-degrading treatment.¹⁷ Dignity prohibits actions that humiliate by defiling an animal’s core being and depriving her of opportunities to fulfill her species capacities and individual purposiveness. Norms of morality and law should recognize animal dignity constraints.

In making these claims I remain purposefully agnostic on the application of ‘personhood’ to animals in law and morality for which some have advocated.¹⁸ Although I believe that the philosophical attributes of personhood do apply to nonhumans, including planning, complex problem solving, sense of self, adaptability to novel environmental challenges, etc.,¹⁹ the use of the term tends to alienate lay people who do not understand this technical meaning and interpret its application to animals as denigrating humans. Although personhood proponents rightly point out that the word is applied to corporations and even ships in the legal context,²⁰ many lay people consider these applications ridiculous and demeaning to humans.²¹ Because of the conventional application of the term ‘person’ to humans only, I think it best to avoid applying the term to nonhumans because I fear this impedes persuasion and effective advocacy. In its stead, the idea of animal dignity serves many of the same functions as ‘personhood’ in a moral or

¹⁵ Marc Bekoff, *Animal Emotions: Exploring Passionate Natures*, 50(10) *BIOSCIENCE* 861, 861–70 (2000); Mike Schwager, *The Emotional Lives of Animals*, ENRICHMENT.COM, <http://www.enrichment.com/content/enrichmentcom-interviews-marc-bekoff-author-emotional-lives-animals> [https://perma.cc/7WKX-BKU3] (accessed Dec. 20, 2016).

¹⁶ See, e.g., ROSEN, *supra* note 3, at 30, 40 (describing dignity as both intrinsic and extrinsic).

¹⁷ *Id.* at 61, 65, 119; KATEB, *supra* note 2, at 14–15.

¹⁸ See, e.g., THOMAS I. WHITE, *IN DEFENSE OF DOLPHINS* 165, 182–84 (2007) (advocating that dolphins are persons); STEVEN M. WISE, *DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS* 32, 44, 240 (2002) (advocating for legal personhood for some nonhuman animals).

¹⁹ See WHITE, *supra* note 18, at 156–64 (advocating that dolphins are persons, as they display philosophical attributes associated with personhood).

²⁰ See, e.g., Bryant Smith, *Legal Personality*, 37 *YALE L.J.* 283 (1928) (noting that personhood has been attributed to corporations and even ships); Jeffrey Skopek, *Animals in Court: Does Personhood Matter?*, *HARV. L.: BILL OF HEALTH* (Dec. 6, 2013), <http://blogs.law.harvard.edu/billofhealth/2013/12/06/animals-in-court-does-personhood-matter/> [https://perma.cc/3NUT-JBFW] (accessed Dec. 20, 2016) (noting that corporations and ships have been given legal personhood).

²¹ See, e.g., Ashley Parker, *Corporations Are People, Romney Tells Iowa Hecklers Angry over His Tax Policy*, *N.Y. TIMES* (June 3, 2016), <http://www.nytimes.com/2011/08/12/us/politics/12romney.html> [https://perma.cc/E2F2-QEM5] (accessed Dec. 20, 2016) (stating that many voters see presidential candidate Mitt Romney as out-of-touch based on his view that corporations are legal persons).

legal regime in that it demands attention to animal being and imposes a burden of proof on humans who are intervening in animal lives. The idea also permits more flexible appreciation of the enormous variety in species and individual functioning than ‘personhood,’ which relies on human-like traits. Dignity belongs to an array of creatures beyond primates, cetaceans, and even mammals. The idea is more egalitarian.

II. ATTRIBUTES OF HUMAN DIGNITY

A. *Consciousness*

A long tradition in Western thought includes the idea that humans are unique as a species because of their ability to reflect on the world and their position in it.²² This view of human dignity is often described in explicit contrast to nonhuman animals: “The small genetic difference between humanity and its closest relatives is actually a difference in capacity and potentiality that is infinitely large, which actually means it can *never* be fully measured.”²³ The Greek and Roman Stoics placed humans at the top of a hierarchy of life because of powers of reasoning and self-restraint.²⁴

In monotheistic biblical thought, God created humans in His image with instructions to use other living beings for their purposes and to safeguard the rest of creation.²⁵ Eighteenth-century Enlightenment thinking also set humans apart and above other beings based on the abilities to reason through language and rational thought.²⁶ Human dignity emerging from consciousness is central in many modern international laws and documents and is often treated as the basis of universal and inviolable human rights.²⁷ Although the U.S. Constitution does not mention dignity explicitly, the idea has been vital to legal understanding of the limits of government over individuals.²⁸ Human powers of reasoning are often touted as the basis for this dignity as a core intrinsic value.²⁹ In the prevailing modern view, however, even

²² See, e.g., KATEB, *supra* note 2, at 27 (stating that only humans can worry about dignity).

²³ *Id.* at 17 (comparing species traits of humans and chimpanzees).

²⁴ See, e.g., ROSEN, *supra* note 3, at 12 (describing the views of Cicero).

²⁵ See, e.g., SACKS, *supra* note 5, at 164–65 (2003) (describing the superior biblical role of humans); Steven M. Wise, *Animal Rights, One Step at a Time* (explaining that in the Bible “God granted humans dominion ‘over the fish of the sea, and over the fowl of the air, and every living thing that moveth upon the earth’”), in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 19, 22–23 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

²⁶ See, e.g., JOHN GRAY, *STRAW DOGS: THOUGHTS ON HUMANS AND OTHER ANIMALS* 38, 94, 103, 136, 173 (2002) (describing the Enlightenment view of human superiority).

²⁷ See, e.g., G.A. Res. 217 (III) A, *supra* note 1, art. 1 (“All human beings are born free and equal in dignity and rights. They are endowed with reason and consciousness and should act towards one another in a spirit of brotherhood.”).

²⁸ Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 169, 181, 208–09 (2011).

²⁹ See, e.g., KATEB, *supra* note 2, at 7, 27, 162, 171, 199 (relating that Socrates would rather die than give up his pursuit of wisdom); MIRANDOLA, *supra* note 11, at 3–5, 10–11

humans lacking such powers because of infancy or infirmity share equally in inviolate dignity simply because they are human.³⁰ These notions about human powers and uniqueness are prominent in historical and contemporary treatments of dignity in the West.

B. Agency and Autonomy

Related to consciousness and rational capacities, human dignity is closely associated with free action and self-determination. Humans possess dignity because they can make decisions and act accordingly, the basic ground of free agency.³¹ These powers to shape the future are related to being the ‘author’ of one’s character and possessing identity over time.³² Thus, the integrity of individuals is part of their dignity. According to animal lawyer, and ‘personhood’ advocate, Steven Wise, “because fundamental liberties and equality are universal among humans, they must turn on something else. We will see that this ‘something else’ is not their membership in the species *Homo sapiens* but their autonomy.”³³ Bio-ethicist Ruth Macklin even claims that the idea of human dignity is reducible to autonomy.³⁴ For those who agree with Macklin, this autonomous agency exhausts dignity, making the label superfluous or a conclusion rather than an idea with independent content. Others have conceded the importance of free agency to human dignity, even though they think the idea of dignity has greater breadth.³⁵

Humans have an integrity that comprises their dignity because they experience themselves in narrative form as having a past, pre-

(theorizing that after God created “the fermenting dung-heap of the inferior world teeming with every form of animal life,” He “still longed for some creature which might comprehend the meaning of so vast an achievement”).

³⁰ See, e.g., ROSEN, *supra* note 3, at 8–9 (“[T]he quality of dignity, once the property of a social elite, has, like the idea of rights, been extended outward and downward until it has come to apply to all human beings.”); Elizabeth Anderson, *Animal Rights and the Values of Nonhuman Life* (claiming that the possession of “distinctly human” capacities is not a prerequisite for individual rights, but rather “morally relevant capacities, such as sentience and will”), in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, *supra* note 25, at 277, 280.

³¹ See, e.g., KATEB, *supra* note 2, at 14, 20, 38 (discussing agency); MIRANDOLA, *supra* note 11, at 7, 10 (describing the divine origin of human free will); ROSEN, *supra* note 3, at 5, 25 (claiming that autonomy is a major part of rational agency, which constitutes dignity); WALDRON, *supra* note 2, at 20, 50 (pointing out that planning and acting based on that plan is basic free agency).

³² See KATEB, *supra* note 2, at 10, 12, 92–93, 130 (describing the attainment of a unique identity as an accomplishment worthy of dignity); MIRANDOLA, *supra* note 11, at 11 (describing the “ever-changing” nature of humans); SACKS, *supra* note 5, at 75, 78 (discussing human self-shaping).

³³ STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 179 (2000).

³⁴ See ROSEN, *supra* note 3, at 5, 120 (quoting a headline of an article Macklin wrote: “Dignity is a useless concept. It means no more than respect for persons or their autonomy.”).

³⁵ See *id.* at 16–17 (referencing multiple meanings of dignity including intrinsic value).

sent, and future.³⁶ According to the uniqueness view, only humans can reflect on their lives, deaths, and place in the world.³⁷ This view has caused even animal advocates to claim that causing pain or ending lives produces more suffering in humans than animals.³⁸

One way to analyze the idea of dignity is to begin with its clear violations and then extrapolate from those concrete instances to generalize about the key components of the idea.³⁹ According to philosopher Ralf Stoecker, this approach at least initially avoids metaphysical arguments about essential properties of human beings that comprise their dignity and best explains why people care about dignity at all.⁴⁰ Stoecker never questions the limitation of dignity to humans, although he emphasizes “how broad the scope of its application is” and refers to “many different areas in which we are confronted with morally questionable actions that we are inclined to describe as violations of human dignity.”⁴¹ One need make no assumptions about equivalent suffering to note that many of the clear violations Stoecker mentions apply regularly to animals, including killing, severe hunger, “hard and monotonous work,” prevention of relations, restricted liberty, injustice, “disregard of privacy,” being treated as instruments, isolation, and interference in biological nature.⁴² The violations approach to dignity is promising for animals because of the identifiable harms they endure approximating the worst offenses to humans. Combined with the call for a broad understanding of the multifarious idea of dignity, applying the idea in the animal context should not be overlooked.

Self-control is an outward manifestation of this sense of enduring self, which is partly why, taking a negative approach, people commonly consider a person who is drunk, begging, or obsequious to the point of submission undignified. Historical records indicate that humans who persecute other humans humiliate their victims, portraying them as helpless and lacking in agency.⁴³ For example, the Nazis starved their concentration camp victims, shaved their heads, crowded them, and clothed them in filthy uniforms to diminish their individual-

³⁶ See SACKS, *supra* note 5, at 75 (discussing the narrative form of human experience).

³⁷ *Id.* at 117, 151, 216; ROSEN, *supra* note 2, at 18 (citing Pascal).

³⁸ See TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 19, 25 (Susan J. Armstrong & Richard G. Botzler eds., 2d ed. 2004) (positing death as a greater loss to a human than a dog); Peter Singer, *Practical Ethics* (positing that humans feel more pain than animals, and yet this does not undermine the equal consideration of nonhuman interests), in *THE ANIMAL ETHICS READER* 36, 37 (Susan J. Armstrong & Richard G. Botzler eds., 2d ed. 2008).

³⁹ See Stoecker, *supra* note 7, at 7 (laying out three different approaches to understanding human dignity, including the “negative turn” of starting the inquiry with clear violations of human dignity).

⁴⁰ *Id.* at 9, 11–12.

⁴¹ *Id.* at 12.

⁴² *Id.*

⁴³ See, e.g., David Luban, *Human Dignity, Humiliation, and Torture*, 19 KENNEDY INST. ETHICS J. 211, 224 (2009) (calling attention to the degrading and humiliating character of torture to fully expound its degree of evil).

ity and personal agency.⁴⁴ Psychologist Philip Zimbardo replicated disturbingly similar treatment in his well-known psychological prison experiment, in which the subjects assigned to be ‘guards’ invented ways to humiliate their assigned ‘prisoners,’ such as making them perform demeaning acts like cleaning toilets with their hands.⁴⁵

Thwarting human autonomy in pervasive ways is a serious violation of dignity. Slavery, forced labor, and involuntary commitment are among the deepest affronts to universal human dignity because they destroy freedom of action.⁴⁶ In these conditions, those in control subordinate their subjects almost completely. Most humans value autonomy both instrumentally and intrinsically. A meaningful plan for the future implies freedom of will. Besides the importance of acting freely on plans, autonomy is central to constituting oneself and the self-identity over time that ensures integrity. Without meaningful autonomy, being human would have less personal and cultural value.

Violations of autonomy range from fleeting limitations on freedom of movement to an endless state of confinement, such as imprisonment. Being caught in traffic might prevent a driver from making an appointment, but the subject does not experience this event as a serious impediment to future realization of intentions and purposes. Long-term restrictions on mobility, on the other hand, change one’s prospects and affect identity in deep and pervasive ways. Privacy is related to agency in providing essential space for self-direction and expression in various roles.⁴⁷ Constant monitoring is an affront to dignity.⁴⁸ Privacy provides room to explore powers of self-expression and exercise reasonable autonomy without coercion or pressure.⁴⁹

⁴⁴ John P. Sabini & Maury Silver, *Destroying the Innocent with a Clear Conscience: A Sociopsychology of the Holocaust* (“Perhaps the most potent technique of degradation is to make the individual filthy, to make him stink.”), in *SURVIVORS, VICTIMS, AND PERPETRATORS: ESSAYS ON THE NAZI HOLOCAUST* 329, 347 (Joel E. Dimsdale ed., 1980); see also JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* 23 (Yale Univ. Press 2d ed. 2012) (describing British methods of degrading colonized Indians through forcing them to crawl, rub their noses in dirt, and kiss the boots of authorities).

⁴⁵ PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 223 (2008).

⁴⁶ See, e.g., WALDRON, *supra* note 2, at 19 (listing situations of gross humiliation that are prohibited by the human rights covenants, like detention, incarceration, forced hospitalization, and military captivity).

⁴⁷ See, e.g., James Rachels, *Why Privacy Is Important*, 4 *PHIL. & PUB. AFF.* 323, 326–327 (1975) (explaining that privacy is essential to varying relational behavior).

⁴⁸ See KATEB, *supra* note 2, at 99 (writing that close scrutiny adds to a prisoner’s degradation); Luban, *supra* note 43, at 221 (writing that constant observation adds to the humiliation of torture).

⁴⁹ Bruce M. Landesman, *Confidentiality and the Lawyer-Client Relationship* (explaining that “the transfer of personal information is a morally complex matter”), in *THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 191, 196, 200 (David Luban ed., 1984).

C. Moral Agency

Immanuel Kant is probably most associated with the view that human dignity emerges from unique rational powers to recognize moral laws and follow them out of duty.⁵⁰ The capacity to deliberate on the ends of a good life and to choose courses of action on that basis is the characteristic of human dignity that many think sets humans starkly apart from other animals.⁵¹ According to Kant, humans owe only indirect duties to animals because mistreating beasts promotes cruelty to humans and thus damages personal character.⁵²

Reciprocity of rights is part of this thinking. Humans can expect a basic level of treatment from other humans, but they also have duties to treat others with respect.⁵³ This mutuality of respect grounds the idea of universal human rights.⁵⁴ Moral responsibility does not apply to nonhumans on this view because they lack the ability to evaluate and choose moral ends.⁵⁵

The wolf cannot be held morally responsible for killing a young or incapacitated deer, and thus depredation in the animal world does not come within the moral community that generates dignity.

III. ATTRIBUTES OF HUMAN DIGNITY APPLIED TO ANIMALS

A. Animal Consciousness

1. *Is Awareness of Oneself as a Conscious Being Necessary to Dignity?*

Molly was related by marriage to a member of my family. She thrived on order and structure in all aspects of her life. She attended church regularly, even during the week. Her home was modest but immaculate, with even the contents of the drawers meticulously arranged. Her appearance was always neat and her clothing color-

⁵⁰ IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 9–10, 16, 20 (Allen W. Wood ed., Allen W. Wood trans., Yale Univ. Press 2002) (1785).

⁵¹ See KATEB, *supra* note 2, at 13, 27, 48, 160 (distinguishing human self-consciousness from animal consciousness); ROSEN, *supra* note 3, at 29, 61 (explaining the Kantian view that dignity is not intrinsic to all living beings but rather “a feature of those who follow the moral law’s commands”); WALDRON, *supra* note 2, at 63 (discussing how the law must protect dignity for all citizens because of its powerful and coercive nature).

⁵² IMMANUEL KANT, *LECTURES ON ETHICS* 240 (Louis Infield trans., Routledge 2002).

⁵³ See, e.g., LORI GRUEN, *ETHICS AND ANIMALS: AN INTRODUCTION* 60–61 (2011) (discussing “moral agents” as acting intentionally in contrast to “moral patients” not responsible for actions); Anderson, *supra* note 30, at 285–89 (discussing the argument that animals cannot enter into mutual relations and therefore lack moral rights).

⁵⁴ See, e.g., KATEB, *supra* note 2, at 72 (discussing a “duty to recognize and respect rights”); SACKS, *supra* note 5, at 200 (universal respect for humans despite differences).

⁵⁵ See, e.g., GRUEN, *supra* note 53, at 60–61 (“[P]ainlessly killing a non-person who has no conscious interest or desire to continue living is not, all things considered, wrong in the way that killing a person who does have an explicit desire to continue to exist would be, other things being equal.”); KATEB, *supra* note 2, at 26–27 (claiming that necessary to dignity is the mind, which is “a uniquely human possession”).

coordinated. She never raised her voice or engaged in contentious discussions. She never swore or used crude language.

Disorder was the first signal that Molly was suffering from dementia. She spent full, bewildered days at a table covered with cancelled checks and bank statements. She searched for days in vain for the deed to her house, convinced that the state had stolen her property. When it became obvious that she could not function independently, she went to live with one of her sons. There she began to swear in a loud voice over the backyard fence and even made flirtatious advances toward a neighbor. One time she emerged from the shower just after entering, stating that she had forgotten to put on her glasses.

When Molly graduated to assisted living, her family visitors often found her disheveled. Her hair was uncombed and her clothes wrinkled and unmatched. Her son requested that facility caregivers attend more carefully to her appearance. He saw this as basic respect for her dignity although Molly did not appear to notice and even failed to recognize him at times. I think most people would agree readily that this treatment of Molly was degrading and a violation of her dignity. Molly's awareness of herself as a dignified being would not be part of this assessment because Molly appeared oblivious to her appearance. This supports the view that dignity is an important value even for subjects who do not consciously value it.

Of course, someone could respond that Molly's dignity was tied to her past conscious identity, much as courts may credit past statements about preferences in decisions about removing medical support from brain damaged humans.⁵⁶ In contrast, someone may have an interest in dignity without any opportunity to develop an identity and preferences. Does it make sense to speak of violating the dignity of a newborn child, for example? Most parents would not apply clown makeup to a baby or dress one as a vampire before taking the child into a public place. Subjecting a helpless child to others' mirth presents the child as an object of lesser worth and even ridicule, which I think most people conclude is beneath the dignity even of a person too young to have any awareness of the idea.

Is dignity similarly meaningful for a nonhuman who will never develop such an abstract idea? Fing was my daughter's cat. The two shared an unusually close bond, perhaps because Fing had weaned several kittens on the eve of my daughter's birth. As a toddler, my daughter pushed Fing around in a doll carriage and sometimes dressed Fing in hats. Fing was sometimes a nun with a paper towel for a habit. Sometimes she was a bride with a tissue veil. Photos show Fing as complacent and apparently content in her roles. She never tried to escape the situation and followed my daughter everywhere. Perhaps this was because she was a subordinated pet who knew no

⁵⁶ See, e.g., *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 315 (1990) (rejecting "substituted judgment" of family without reliable evidence of patient's wishes).

different way of being,⁵⁷ but she was a playful cat who appeared to enjoy this aspect of a reciprocal relationship. Adult humans sometimes ironically expose their own dignity to comedic responses with playful motivations, for example, in self-deprecating skits or costumes. People enjoy costumed animals, as evidenced in the popularity of YouTube animal vignettes and specialized websites like “trump your cat” that contains user photos of cats and other animals wearing Donald Trump-like hairpieces matching their fur.⁵⁸ Despite lighthearted amusement derived from these displays, do the portrayals raise questions about turning beloved pets into spectacles?

Despite the affection between child and cat, someone could question whether dressing and wheeling Fing impaired her dignity, even though the cat displayed no signs of distress or even the impulse to leave the scene and would seek my daughter’s company soon after such play. Others could say that it is not meaningful to speak of violating a cat’s dignity, because such self-conscious things as outward appearance are not important to animals even as they once were to Molly. First, I think this assessment of an animal’s concern is wrong, because animals demonstrate considerable awareness of how they appear to other animals. In courtship, for example, male animals frequently display colorful markings and talents.⁵⁹ Birds reveal their feathers and sometimes dance to attract prospective mates, who in turn appear to select the markings and actions of some suitors over others.⁶⁰ Domesticated animals also demonstrate awareness of how they appear. Humans with pet relationships are familiar with dogs and cats who display the emotion of shame by cowering and hiding when soiled with feces or skunk scent. The website, “shame your pet,” depicts dogs with amusing facial expressions of apparent shame connected with minor transgressions.⁶¹

2. *Animal Self-Consciousness*

Subjective expectations and feelings are thus not essential to dignity, although these attributes surely enhance its loss. Dignity does not require such awareness or self-conscious valuation, even in

⁵⁷ NUSSBAUM, *supra* note 13, at 343–44 (discussing “adaptive preferences” of captive animals).

⁵⁸ *TrumpYourCat*, INSTAGRAM, <https://instagram.com/trumpyourcat/> [<https://perma.cc/5RAM-WUAH>] (accessed Dec. 20, 2016).

⁵⁹ *Courtship Display*, BBC: NATURE, http://www.bbc.co.uk/nature/adaptations/Courtship_display [<https://perma.cc/7Z2B-PHCM>] (accessed Dec. 20, 2016).

⁶⁰ See, e.g., *World’s Weirdest: Birds “Moonwalk” to Impress the Ladies*, NAT’L GEOGRAPHIC, <http://video.nationalgeographic.com/video/weirdest-manakin-dance> [<https://perma.cc/EYF6-DEJV>] (accessed Dec. 20, 2016) (showing Manakin male bird “moon dancing” on branch to attract mate).

⁶¹ SHAME YOUR PET, <http://shameyourpet.com/> [<https://perma.cc/KKV6-YJJC>] (accessed Dec. 20, 2016); see also Melanie, *14 of the Funniest Dog Shaming Photos Ever*, LIFE WITH DOGS (Aug. 21, 2014), <http://www.lifewithdogs.tv/2014/08/14-of-the-funniest-dog-shaming-photos-ever/> [<https://perma.cc/49K5-6QBQ>] (accessed Dec. 20, 2016) (depicting dogs experiencing shame for minor transgressions).

humans like Molly or the clown-infant, and it makes perfect sense to be concerned with the dignity of a person with dementia, in a persistent vegetative state, a newborn, and a person born without capacities for significant consciousness. A terrible rape case at Vanderbilt University involved several men, including the victim's boyfriend, carrying an unconscious woman through a hotel hallway and then raping her, all on film.⁶² The woman had no recollection of the events and had believed no one at the college would have done such a thing.⁶³ The Tennessee prosecutor showed the film in court, causing the victim to view her own degradation.⁶⁴ Had the woman never discovered the abuse, however, I think people would agree readily that the actions defiled her dignity. As dignity applies meaningfully to demented, infant and unconscious humans, so it applies to nonhumans regardless of self-awareness or abstract understanding of the concept.

Although consciousness of self is not necessary to dignity, many animals do possess self-conscious awareness. People too often fail to credit nonhuman animals with a strong sense of self. The field of cognitive ethology is steadily providing compelling evidence that many animals are both self-conscious and aware of the perspectives of other animals.⁶⁵ Ethology is the discipline that studies the behavior of animals in the laboratory and field to ascertain mental attributes, compare those across individuals and species, and identify physical, neurochemical, genetic, and evolutionary overlaps.⁶⁶ In laboratory conditions, cognitive ethology attributes self-awareness at least to those animals who pass the "mirror-recognition test."⁶⁷ When a dot or other foreign object is placed on the face of an individual, touching the mark on oneself while looking in the mirror suggests awareness of a bodily self apart from the image.⁶⁸ Researchers adapt the test to the varied physical features of the animals—for example, dolphins are unable to point.⁶⁹

Ethology has identified the ability of some nonhuman animals to differentiate other individuals and understand that others have per-

⁶² See, e.g., Alan Blinder & Richard Pérez-Peña, *Vanderbilt Rape Convictions Stir Dismay and Denial*, N.Y. TIMES (Jan. 28, 2015), <http://www.nytimes.com/2015/01/29/us/vanderbilt-rape-trial-didnt-stir-students-on-campus.html> [<https://perma.cc/53BN-NGAJ>] (accessed Dec. 20, 2016) (describing the facts of the Vanderbilt rape case).

⁶³ *Id.*

⁶⁴ See, e.g., Eliana Dockterman, *The Vanderbilt Rape Cases Will Change the Way Victims Feel About the Courts*, TIME (Jan. 29, 2015), <http://time.com/3686617/the-vanderbilt-rape-case-will-change-the-way-victims-feel-about-the-courts/> [<https://perma.cc/69AP-L6TY>] (accessed Dec. 20, 2016) (discussing the Vanderbilt rape case and forcing victims to face their attackers).

⁶⁵ MARC BEKOFF & JANE GOODALL, *MINDING ANIMALS: AWARENESS, EMOTIONS AND HEART* 128–29 (2002) (discussing animal "theory of mind" or "cognitive empathy" and its neurological basis).

⁶⁶ *Id.* at 86–87.

⁶⁷ *Id.* at 93–95 (attributing self-conscious awareness to animals recognizing the spot on themselves).

⁶⁸ *Id.*

⁶⁹ WHITE, *supra* note 18, at 182–84 (describing adaption of mirror test to dolphins).

spectives that differ from one's own.⁷⁰ They call this having "a theory of mind."⁷¹ They observe animals adapting their behavior in the presence of others, for example, captive orangutans hiding objects such as keys to the cage from human keepers.⁷² Birds in the *corvid* family (ravens, jays, crows, etc.) are aware of other birds watching them store food in a cache and will later move the stash to a secret location.⁷³ These activities are difficult to explain without supposing that the animal has some understanding of itself as a separate being, and that others have differing mental states, much as humans perceive other humans.⁷⁴

Some scientific critics accuse ethology of anthropomorphizing animal behavior—unreliably projecting human experiences and attributes on other animal species.⁷⁵ Many who study animals respond that such descriptions are more useful and complete than explanations that reduce purposive and adaptive behavior to instinct or biochemistry.⁷⁶ Attributing an emotion like fear to an animal is different from describing hormonal changes, bodily postures, and brain responses. The latter description would neither explain the animal's experience from a phenomenological perspective, nor capture the animal's overall response.⁷⁷ Ethology also emphasizes that, since Darwin, knowledge of evolution as a continuum supports reasonable inferences about shared behavior and mentality.⁷⁸

Animal self- and other-awareness is also part of ordinary and commonsense experiences with companion animals. Most people are sure that their dogs mold their behavior to anticipated human responses. I grew up with a boxer who escaped her leash at every opportunity. As she aged, she suffered from leg arthritis, but that did not stop her from rampaging the neighborhood at high speed. When she tired of the romp, however, she would round a bend into the yard in full limp. It would be hard to convince anyone in my family that this was not a clever theatrical device to obtain sympathy and distract us from her act of defiance.

⁷⁰ See BEKOFF & GOODALL, *supra* note 65, at 128–29 (describing research of "mirror neurons" in animals).

⁷¹ *Id.*

⁷² DAVID W. CAMERON & COLIN P. GROVES, BONES, STONES AND MOLECULES: "OUT OF AFRICA" AND HUMAN ORIGINS 80 (2004) (relating the story of an orangutan at a London Zoo who made and hid a key to his cage).

⁷³ Donald R. Griffin & Gayle B. Speck, *New Evidence of Animal Consciousness* (describing behavior of scrub jays), in THE ANIMAL ETHICS READER, *supra* note 38, at 126, 130.

⁷⁴ See, e.g., BEKOFF & GOODALL, *supra* note 65, at 67–68 (discussing the awareness of separate mental beings in nonhumans).

⁷⁵ *Id.* at 41.

⁷⁶ Bernard E. Rollin, *Animal Pain*, in THE ANIMAL ETHICS READER, *supra* note 38, at 135, 136–38.

⁷⁷ *Id.*

⁷⁸ BEKOFF & GOODALL, *supra* note 65, at 48, 87.

Field biologists have reported emotions like embarrassment in animals in the wild, an idea without meaning unless an individual is aware of others' perceptions.⁷⁹ For example, primatologist Jane Goodall observed a male chimpanzee trying to impress the alpha male of the group.⁸⁰ The younger male was swinging from a plantain branch that suddenly broke, depositing him in the grass below.⁸¹ The chimp anxiously looked toward his male hero and relaxed upon noticing the other's averted gaze.⁸²

Ethologist Marc Bekoff has extensively studied the play activity of social carnivores including coyotes and wolves and concluded that "social play is a foundation of fairness."⁸³ Bekoff notes that the animals signal to a prospective playmate the desire to play by performing a characteristic "play bow."⁸⁴ Animals refrain from overpowering their cohorts in play, letting the playmates know that this is not a competition for dominance, food, or mates.⁸⁵ It is not easy to explain these observations without inferring that the animals have complex awareness of themselves as individuals in relation to others.

We know animal awareness only inferentially since animals cannot speak, but ultimately we also infer the many conclusions we draw about human mental states. No one can experience the mind of another directly, which might push some skeptics to deny knowledge of other human minds.⁸⁶ Yet humans must make inferences about others' mental states in order to function in the world.⁸⁷ Although fellow humans can use language to express their beliefs and feelings, many conclusions about other people are based on non-verbal cues like body language, facial expressions, and sounds.⁸⁸ Inferences about animals are weaker than those about humans because animals lack language and other intra-species similarities, but it would be unreasonable to conclude that we can infer no reliable information about animals with whom we share much biological and evolutionary history. Indeed, animal trainers depend on the reliability of such inductions in tailoring tasks to achieve desired results, shepherders rely on assumed animal characteristics, and even a person who beats a dog displays confidence that the animal feels pain.⁸⁹

⁷⁹ *Id.* at 117.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ MARC BEKOFF, *ANIMAL PASSIONS AND BEASTLY VIRTUES: REFLECTIONS ON REDECORATING NATURE* 123 (2006).

⁸⁴ *Id.* at 131.

⁸⁵ *Id.* at 125.

⁸⁶ See Rollin, *supra* note 76, at 138 ("[T]he attribution of mental states, especially those associated with pleasure and pain, joy and misery, is connected irrevocably with the possibility of morality.").

⁸⁷ *Id.* at 138.

⁸⁸ Griffin & Speck, *supra* note 73, at 131 (noting non-verbal communication).

⁸⁹ See Rollin, *supra* note 76, at 138 (using example of person beating dog to demonstrate common sense belief in animal pain).

The complex awareness of animals thus sufficiently qualifies for the consciousness dimension of dignity. Although having dignity without self-consciousness is meaningful, rich mentality enhances the role of dignity as a moral constraint. A self-aware being can be harmed in more ways than one who lacks this orientation to the world. A socially aware being may be harmed in more ways still. Looking ahead, this is why a life of confinement and isolation for a social creature like an ape, pig, or wolf harms that animal's dignity.

B. Animal Agency

Do animals have the kind of agency that traditionally qualifies humans for dignity? Certainly they move through their environment actively and struggle to survive in their present circumstances. Yet humans' dignity supposedly involves free agency in the ability to deliberate about their situation and direct the future. According to conventional thinking, animals operate from instinct or stimulus and response instead of directing their lives.⁹⁰

Some would object that deprivations of autonomy apply only to humans, who possess a conception of the future and continuity with a past self.⁹¹ Although both humans and animals must die, the objector would say that animals do not conceptualize their own death,⁹² in part because they lack language that facilitates the formation of abstract ideas such as mortality.⁹³ Yet wild animal behavior strongly demonstrates the will and desire to survive, suggesting that animals value their continuing existence. Wolves, for example, are wary of humans and learn rapidly to avoid hunters and traps.⁹⁴ If trapped, they apply great efforts to escape.⁹⁵

Even highly domesticated animals, like pet dogs, seem to relish periodic freedom from the leash or pen, as their human companions know all too well from chasing their dogs on a romp. Lifelong human control does not eradicate the urge for freedom. Animals born in captivity (in zoos and marine facilities) have no experience of autonomy in the wild. Yet they sometimes become celebrities by fleeing confinement.⁹⁶ The public rejoices in such adventures, rooting for the free and

⁹⁰ See, e.g., GRUEN, *supra* note 53, at 48–49 (discussing various meanings of instinct).

⁹¹ See, e.g., KATEB, *supra* note 2, at 159, 169–71.

⁹² See, e.g., GRAY, *supra* note 26, at 130 (criticizing human distinction from animals based on envisioning death); KATEB, *supra* note 2, at 117 (distinguishing humans based on animals' inability to know that they exist).

⁹³ KATEB, *supra* note 2, at 117 (discussing how language capacity allows for self-understanding).

⁹⁴ BRUCE HAMPTON, *THE GREAT AMERICAN WOLF* 13–14 (1997).

⁹⁵ *Id.*

⁹⁶ See, e.g., Mary Bowerman, *Is a Lion on the Loose in Milwaukee?*, USA TODAY (July 22, 2015, 2:00 PM), <http://www.usatoday.com/story/news/nation-now/2015/07/22/milwaukee-mountain-lion-cougar-spotted-twitter/30507877/> [<https://perma.cc/RSN6-X2R8>] (accessed Dec. 20, 2016) (describing sightings of a lion who had become a 'celebrity').

thereby noble creature. Stories about animals exercising their liberty in distinctive ways spark admiration for the animals' dignity.

Extreme deprivations of freedom sometimes provoke retaliatory anger in animal captives. The movie *Blackfish* tells the story of Tilikum, the captive SeaWorld orca, who killed several people including a trainer who used food to control the animal.⁹⁷ Instead of faulting the animal for his aggression, *Blackfish* urged that extreme deprivations of freedom and agency drove Tilikum to pathological behavior, as it does many captive animals.⁹⁸ Zoo animals, for example, frequently engage in stereotypic conduct like idle chewing, pacing, and rocking, which experts attribute to boredom and suffering from confinement.⁹⁹ In a new book, Jason Hribal describes incidents of animal protests in refusals to follow human directives and aggressive retaliation toward the humans in control.¹⁰⁰ Hribal interprets these acts as revengeful and attributes agency to captive animals with no meaningful freedom.¹⁰¹

Ethology offers evidence against separating humans and animals on grounds of agency, revealing that some nonhuman animals demonstrate planning for the future and strong and accurate memories of the past. For example, birds in the *corvid* family cache their food for future use.¹⁰² Traditionally, scientists explained this behavior through instinct, or 'hard wired,' fixed instincts developed over evolutionary time.¹⁰³ Recent studies raise doubts about the completeness of this explanation and show that *corvids* adapt their caching practices to particular environmental conditions in a problem-solving mode.¹⁰⁴ In one example, experimenters acclimated a bird to two rooms suitable for caching, one of which was colder in temperature.¹⁰⁵ When given a choice of caching in either room, the birds selected the colder area to store perishable items.¹⁰⁶

Dolphins also display complex skill in solving problems.¹⁰⁷ In the wild they develop multiple strategies for fishing that they adapt to new situations.¹⁰⁸ Anecdotes tell of dolphins soliciting human assistance,

⁹⁷ BLACKFISH (CNN Films 2013).

⁹⁸ *Id.*

⁹⁹ See, e.g., David Hulka, *Boring a Wormhole in the Zoological Arc* (discussing anxiety and related behavior in confined animals), in *METAMORPHOSES OF THE ZOO: ANIMAL ENCOUNTER AFTER NOAH* 123, 135 (Ralph R. Acampora ed., 2010).

¹⁰⁰ JASON HRIBAL, *FEAR OF THE ANIMAL PLANET: THE HIDDEN HISTORY OF ANIMAL RESISTANCE* (2010).

¹⁰¹ *Id.* at 151 (describing resistance as purposeful and intelligent).

¹⁰² Griffin & Speck, *supra* note 73, at 129–31.

¹⁰³ See GRUEN, *supra* note 53, at 48–49 (discussing instinct).

¹⁰⁴ See Griffin & Speck, *supra* note 73, at 129–31 (noting the caching behavior of New Caledonian crows).

¹⁰⁵ *Nova: Inside Animal Minds: Bird Genius* at 37:27 (PBS television broadcast Apr. 9, 2014).

¹⁰⁶ *Id.*

¹⁰⁷ WHITE, *supra* note 18, at 86–91.

¹⁰⁸ *Id.* at 78–79 (describing inventive methods dolphins use to hunt, including stirring up mud, hydroplaning, and herding).

for example, in removing a fishing hook from a tail or mouth.¹⁰⁹ In captivity, dolphins invent novel performance techniques upon the trainer's request.¹¹⁰ Dolphins' brains have three lobes, instead of the two in humans', and the middle *paralimbic* lobe is responsible for both sensory and motor functions, which are separated in humans.¹¹¹ Researchers speculate that this difference in information processing allows for more integrated and multi-dimensional perception and thinking in the dolphin.¹¹²

Since primatologist Jane Goodall's discovery in 1960 that chimpanzees modify and use sticks as tools to extract termites from their habitat,¹¹³ scientists have discovered that many nonhumans make and use tools for a variety of tasks.¹¹⁴ Dolphins in Shark Bay, Australia, for example, use sponges apparently to protect their body parts used in foraging for food.¹¹⁵ Recent field studies suggest that chimpanzees make and use homemade spears for hunting, an activity long attributed to humans alone.¹¹⁶ Young chimps learn this from their mothers.¹¹⁷

Writing on the uniqueness of human dignity, environmental ethicist, Holmes Rolston III, insists that animals lack any capacity to teach, which requires complex understanding of cultural values that unify generations.¹¹⁸ Of course, no one really knows whether animals value group consciousness for its own sake, and this may be a distinctively human interest. Ethicist Paul Taylor, however, claims that such normative judgments may not be important to nonhumans and do not justify conclusions about human superiority.¹¹⁹ Although animals may not consciously transmit culture for its intrinsic value, they do transmit complex information about tools and other techniques that facili-

¹⁰⁹ *Id.* at 92–93 (accounting the story of a dolphin patiently allowing humans to remove hooks).

¹¹⁰ *Id.* at 86–87 (describing the work of Karen Pryor with dolphins Hou and Malia).

¹¹¹ *Id.* at 37–38.

¹¹² *Id.* at 38–40.

¹¹³ CARL SAFINA, *BEYOND WORLDS: WHAT ANIMALS THINK AND FEEL* 194 (2015).

¹¹⁴ *Id.* at 194–95.

¹¹⁵ WHITE, *supra* note 18, at 124–25.

¹¹⁶ Bob Yirka, *Chimps in Senegal Found to Fashion Spears for Hunting*, PHYS.ORG (Apr. 15, 2015), <http://phys.org/news/2015-04-chimps-senegal-fashion-spears.html> [<https://perma.cc/XAA7-ZF55>] (accessed Dec. 20, 2016).

¹¹⁷ Iowa State Univ., *Chimpanzees Discovered Making and Using Spears to Hunt Other Primates*, SCI. DAILY (Feb 23, 2007), <https://www.sciencedaily.com/releases/2007/02/070222155719.htm> [<https://perma.cc/9D7C-JMLC>] (accessed Dec. 20, 2016).

¹¹⁸ Holmes Rolston III, *Chapter 6: Human Uniqueness and Human Dignity: Persons in Nature and the Nature of Persons*, HUM. DIGNITY & BIOETHICS: ESSAYS COMMISSIONED BY PRESIDENT'S COUNCIL ON BIOETHICS (March 2008), https://bioethicsarchive.georgetown.edu/pcbe/reports/human_dignity/chapter6.html [<https://perma.cc/85P2-HMUG>] (accessed Dec. 20, 2016).

¹¹⁹ See Paul Taylor, *Biocentric Egalitarianism* (arguing against using moral agency as a standard for judging nonhumans), in ENVIRONMENTAL ETHICS: READINGS IN THEORY AND APPLICATION 205, 216–17 (Louis P. Pojman & Paul Pojman eds., 6th ed., 2d prtg. 2012).

tate survival,¹²⁰ and this technical information differs among groups of the same species.¹²¹ Planning activities also vary in regional animal populations in accordance with particular environmental conditions.¹²² Although the chimpanzees Jane Goodall studied in Tanzania used twigs and leaves as tools to obtain food, chimpanzees in other coastal regions of Africa use stone ‘hammers’ (rocks or large pieces of wood) to smash and open nuts where these nutritious resources are available.¹²³ Adults transmit particular techniques to the young, and these become, over time, characteristic methodologies for the group, supporting the growing belief among scientists that some nonhuman animals have culture.¹²⁴

Many other examples of sophisticated animal planning suggest that humans are not unique,¹²⁵ although humans may plan farther into the future and even for their contemplated deaths. Captive orangutans deceive humans and other orangutans by feigning interest in something to distract the observer from noticing the true object of their interest.¹²⁶ Orangutans also bargain with other animals, even across species, to obtain a desired item.¹²⁷ Such behavior cannot be explained by instinct or ‘hardwiring’ because it shows adaptability to current and novel conditions, the key to free agency. Of course, someone could object that such behavior is determined instead of free, but no one can prove the philosophical assertion of freedom even about humans. If one accepts the notion of free agency at all, it becomes unscientific to explain away the rich evidence of animal planning and adaptability that characterize intelligence.

Elephants also engage in complex conduct that appears highly deliberate, even regarding death. They will return repeatedly to the loca-

¹²⁰ See, e.g., JANE GOODALL, *THROUGH A WINDOW: MY THIRTY YEARS WITH THE CHIMPANZEES OF GOMBE* 6, 21–22 (First Mariner Books ed., 2000) (1990) (observing that chimpanzees transmit behaviors and information).

¹²¹ See, e.g., Michael Balter, *Strongest Evidence of Animal Culture Seen in Monkeys and Whales*, *SCIENCE* (Apr. 25, 2013, 2:00 PM), <http://news.sciencemag.org/brain-behavior/2013/04/strongest-evidence-animal-culture-seen-monkeys-and-whales> [https://perma.cc/TF6F-9F62] (accessed Dec. 20, 2016) (discussing differing transmission of behaviors and information).

¹²² See, e.g., Sue Boinski et al., *Do Brown Capuchins Socially Learn Foraging Skills?* (describing variations in primate tool use based on local conditions), in *THE BIOLOGY OF TRADITIONS: MODELS AND EVIDENCE* 365, 383 (Dorothy M. Fragaszy & Susan Perry eds., 2003).

¹²³ SAFINA, *supra* note 113, at 194–95.

¹²⁴ See BEKOFF, *supra* note 83, at 13 (describing cultural variation in chimpanzees); GOODALL, *supra* note 120, at 22 (describing chimpanzees being taught languages and inventing words).

¹²⁵ See, e.g., GOODALL, *supra* note 120, at 22 (describing chimpanzees making tools for future termite extraction); Griffin & Speck, *supra* note 73, at 130 (describing scrub jays anticipating future theft by other birds and adapting food storage accordingly).

¹²⁶ See, e.g., EUGENE LINDEN, *THE OCTOPUS AND THE ORANGUTAN: MORE TRUE TALES OF ANIMAL INTRIGUE, INTELLIGENCE, AND INGENUITY* 144–46 (2002) (deceiving humans and other orangutans about true purposes).

¹²⁷ *Id.* at 147–48 (referring to orangutans, chimps and gorillas as “inveterate traders”).

tion of a group member's corpse, touching the decayed bones with their trunks and displaying sadness and distress in uncharacteristic silence.¹²⁸ In addition to suggesting that elephants comprehend death and feel complex emotions like grief, this behavior shows that elephants recall significant events like deaths over time and shape their actions accordingly.¹²⁹ Two female circus elephants, Shirley and Jenny, recognized each other after twenty years of separation.¹³⁰

Another way to understand the centrality of agency to dignity is to consider clear violations of dignity and identify the harms to agency in those cases. One common way to violate human dignity is to impede control over actions.¹³¹ Stripping a person of choices and removing the means of self-control is a serious affront to dignity.¹³² Any form of slavery or servitude destroys or diminishes the agency and thus the dignity of the enslaved.¹³³ Torture is an offense to dignity beyond physical and psychological damage because it obliterates the subject's self-control.¹³⁴ The Abu Ghraib photographs showing prisoners forced to carry out humiliating acts like forming pyramids of naked men, being 'walked' on dog leashes, and urinating on each other are other glaring examples of indignity.¹³⁵ Yet many animals are forced throughout their lives to forego basic requirements of movement, social interaction, and activities that are normal to beings of their kind. If these animals possess the complex agency that extensive research supports, it is arbitrary to exclude them from the rubric of dignity with its accompanying moral constraints on compromising agency.

This is not to suggest that coercion is necessary to violate human or animal dignity, because dignity has multiple dimensions beyond autonomy, but rather that a non-voluntary condition is one kind of dignitary harm, and it magnifies other kinds. Even if Molly chose wrinkled and unmatched clothing, and Fing sought out costumes, it would be meaningful to refer to the diminished dignity of both. This is why a French Council court upheld a law prohibiting a barroom game of throwing a dwarf as an offense of dignity, despite one subject's full consent and claim of being denied gainful employment.¹³⁶ In addition to the individual subject's interests, dignity has public significance to social norms that sometimes override personal liberty.¹³⁷

¹²⁸ SAFINA, *supra* note 113, at 67–69.

¹²⁹ *See id.* at 17, 39–40, 105 (describing exceptional elephant memory).

¹³⁰ GRUEN, *supra* note 53, at 131.

¹³¹ *See, e.g.*, Luban, *supra* note 43, at 224 (explaining the degradation that results from the destruction of a victim's will).

¹³² *Id.*

¹³³ *See, e.g.*, KATEB, *supra* note 2, at 20–21 (positing that crimes against humanity such as captivity, torture, and slavery are the most serious crimes against human dignity and morality).

¹³⁴ Luban, *supra* note 43, at 223.

¹³⁵ *Id.* at 221–22.

¹³⁶ *See* Henry, *supra* note 28, at 222 (describing the case as an instance of dignity as "collective virtue").

¹³⁷ *Id.*

C. Moral Agency and Animals

Membership in the moral community is the feature most distinctive to human dignity in Western post-Enlightenment thinking.¹³⁸ The idea is most associated with Immanuel Kant's idea that the rational Will enables humans to recognize the moral law and follow duty over inclination.¹³⁹ At least four related issues arise in comparing this human attribute with animals and applying dignity across species. The first issue is whether human dignity should be a basis of comparison when considering animal dignity. The second issue is whether moral agency in any form is necessary to viewing dignity as constraining others in the treatment of its possessors. The third is the empirical issue whether nonhuman animals demonstrate aspects of moral behavior similar enough to human morality to qualify them for dignity conceived as requiring moral capacities. The fourth issue is whether complex morality as a human trait makes humans superior to animals who may lack it, thus making human dignity unique.

1. *Should Human Dignity Be a Basis of Comparison for Animal Dignity?*

I concede that this step carries risks similar to conceiving animal interests and capacities using human interests as the standard. I think Paul Taylor exposed this flaw in reasoning best when he emphasized the importance of taking each living individual as "a center of life" with its own needs and interests.¹⁴⁰ To judge a nonhuman individual lacking in human attributes it does not need to function is to beg the question of merit, for the nonhuman will inevitably fall short. At the same time, to overlook unique qualities animals possess that humans do not risks defining the dignity interests of the animals too narrowly.

Despite these concerns about comparisons, the central protections of human dignity in post-World War II jurisprudence and morality offer such pivotal potential for improving animal treatment that some analogy is in order. The caution must be that any bridge between human and animal dignity does not render animals shadow-humans. The content of animal dignity must be conceived in its own terms once its centrality is clear enough.

2. *Is Moral Capacity Necessarily Part of Dignity?*

One can question whether moral capacities are necessary for having dignity interests. This idea confuses the moral implications of dignity with its subjects. Many humans imbued with dignity lack moral

¹³⁸ KATEB, *supra* note 2, at 13; ROSEN, *supra* note 3, at 25–27; SACKS, *supra* note 5, at 79.

¹³⁹ KATEB, *supra* note 2, at 13; ROSEN, *supra* note 3, at 26–27; SACKS, *supra* note 5, at 79.

¹⁴⁰ Taylor, *supra* note 119, at 215.

capacities. Infants and young children, people suffering from late-stage dementia, and accident victims in a persistent vegetative state do not possess the moral reasoning skills of humans as a group.¹⁴¹ Molly's situation described earlier suggests that a person has a dignity even when she no longer thinks about moral requirements and acts on those. She was entitled to moral consideration and appropriate treatment, but this had nothing to do with her own moral capacities. Her interest in dignity did not require morality, although her treatment did.

Animal ethicists frequently refer to this fact about human differences, sometimes called "the Argument from Marginal Cases" (AMC), to dispel the view that humans are entitled to special consideration based on their capacities.¹⁴² Noting that humans do not even consider culling, eating, or performing experiments on extremely disabled humans, animal advocates suggest that the prevalence of such exploitation of nonhuman animals reflects species bias, or "speciesism."¹⁴³ Certainly living a moral life is relevant to the dignity of individuals who do have deliberative capacities and who are able to evaluate judgments and actions, but the dignity of incapacitated humans does not require this propensity.

Whether or not animals display moral impulses and capacities is not directly relevant to having dignity interests. It may be enough that they approach their lives with conscious purpose and are sentient and capable of experiencing pain and distress as well as pleasures and enjoyment. The moral capacities of living beings are not the primary determinant of their dignity, although diverse capacities may be relevant to their treatment as dignified.

3. *Animal Morality?*

Supposing for argument's sake that morality is essential to dignity, the question arises whether animals resemble humans as moral beings. Ethology has begun to alter the view that animals are altogether removed from morality. Ethologist Marc Bekoff and philosopher Jessica Pierce wrote a book on animal justice, in which they present evidence suggesting that animals cooperate, empathize, show compassion, and even risk their own well being to assist other animals and humans.¹⁴⁴ This information does not support the view that animals have highly developed systems of ethics that require language and abstract concepts. Yet, neither does it support the stark moral differentiation between humans and other animals that the classic dignity idea

¹⁴¹ See, e.g., GRUEN, *supra* note 53, at 64–65 (describing some humans lacking certain capacities or characteristics that are typical of normal human adults); Singer, *supra* note 38, at 43–44 (describing how some classes of humans are unable to reciprocate).

¹⁴² GRUEN, *supra* note 53, at 64–65.

¹⁴³ Singer, *supra* note 38, at 37.

¹⁴⁴ See, e.g., MARC BEKOFF & JESSICA PIERCE, *WILD JUSTICE: THE MORAL LIVES OF ANIMALS*, at x (2009) (describing research on the emotional and cognitive lives of nonhuman animals).

includes.¹⁴⁵ Although animal morality may be very different from human morality, growing evidence suggests that it is reasonable to conclude that humans are not the only moral species. Laboratory and field observations of animals have revealed surprising incidences of animal restraint and helping behavior, even across species.¹⁴⁶ Within species, research shows that rats, for example—notably, not animals that humans tend to endow with positive characteristics—will refuse to accept food to satiate hunger if they observe that eating will instigate an electrical shock to another rat.¹⁴⁷ Rats also remember the help of stranger rats, inclining them to assist other strangers in the future.¹⁴⁸ A researcher observed a bonobo monkey in captivity repeatedly trying to fledge an injured starling by positioning it and assisting it to fly.¹⁴⁹ Popular animal documentaries depict animals forming cross-species friendships, even among animals who are usually predator and prey.¹⁵⁰ Lay photographers avidly film such behavior in their animals, creating numerous online animal sensations for an enthusiastic and believing public.¹⁵¹

4. *Moral Superiority of Humans?*

Even if humans are the only moral beings, or the only ones who reason abstractly about moral matters, are they necessarily superior? This was Kant's idea of humanity as an "end in itself" and valuable intrinsically.¹⁵² Human beings are distinctive at least in the sophistication of moral deliberation about the purposes of life and the ends of action.

Is it possible that this complex trait evolved in humans because of their special need for it? A glance at human history reveals a highly destructive species capable of ravaging the environment, inflicting widespread inter-community violence of unprecedented proportions in the rest of the animal world, and behaving in intentionally cruel and violent ways against individual members of their own species. In contrast, some have claimed either that animals are incapable of being

¹⁴⁵ *Id.* at x, 21, 96, 107–09.

¹⁴⁶ *Id.* at 107–09.

¹⁴⁷ *Id.* at 96.

¹⁴⁸ *Id.* at 21.

¹⁴⁹ *Id.* at 108.

¹⁵⁰ See, e.g., *Nature: Animal Odd Couples* (PBS television broadcast Nov. 7, 2012), <http://www.pbs.org/wnet/nature/animal-odd-couples-full-episode/8009/> [<https://perma.cc/JYV8-H6SU>] (accessed Dec. 20, 2016) (filming various interspecies relationships between animals).

¹⁵¹ See, e.g., Jenna Mullins, *2014's Most Popular Video Unsurprisingly Involves an Adorable Animal*, E! NEWS (Dec. 9, 2014, 1:13 PM), <http://www.eonline.com/news/604979/2014-s-most-popular-video-unsurprisingly-involves-an-adorable-animal> [<https://perma.cc/5VJ8-KASM>] (accessed Dec. 20, 2016) (“[U]nsurprisingly, the No. 1 most popular [YouTube] video involves an animal, because we all know they run the Internet.”).

¹⁵² KANT, *supra* note 50, at 45–49.

intentionally cruel,¹⁵³ or are only rarely so.¹⁵⁴ The theory of natural selection is that evolution produces adaptive characteristics that serve the survival of a species.¹⁵⁵ It is possible that humans uniquely benefitted from subtle moral sensibilities and reasoning because only they unleash highly organized violence with the support of modern technology. Perhaps some countervailing impulse was necessary for survival of the living environment and humans themselves.

That humans as a species uniquely continue to need this capacity to rein in their destructive tendencies is evident in current planetary circumstances. Scientific consensus now attributes to humans accelerating climate change¹⁵⁶ and a current major episode of extinction,¹⁵⁷ and centuries of rational thought and sophisticated ethical reasoning have so far not contained these collectively caused conditions.¹⁵⁸ As a group, humans do not seem to change their ways in the face of historical failures and strong evidence of impending resource crises. Acknowledging this makes it difficult to accept human superiority based on moral capacities, but it does provide a plausible explanation for why humans uniquely have developed complex ethics.

Jane Goodall has documented sustained periods of inter-community violence between chimpanzee groups, involving wielding weaponry and terror tactics.¹⁵⁹ This is the nonhuman behavior that most resembles war, in our closest genetic relatives.¹⁶⁰ Yet Goodall also has

¹⁵³ See GOODALL, *supra* note 120, at 109 (“But only humans, I believe, are capable of *deliberate* cruelty—acting with the intention of causing pain and suffering.”); see also WILLIAM T. HORNADAY, *THE MINDS AND MANNERS OF WILD ANIMALS: A BOOK OF PERSONAL OBSERVATIONS* 301 (N.Y., Charles Scribner’s Sons 1922) (claiming that nonpurposive animal killing in the wild is “wholly against the laws of nature”).

¹⁵⁴ HORNADAY, *supra* note 153, at 298–300 (describing infrequent instances of “criminal” animal killing).

¹⁵⁵ See, e.g., SAFINA, *supra* note 113, at 32, 236 (describing instances of adaptations produced by evolution); see also BEKOFF, *supra* note 83, at 69 (examining the relationship between self-cognizance and natural selection).

¹⁵⁶ See, e.g., Stephen M. Gardiner, *Ethics and Global Climate Change* (explaining that humans, through industrialization, increase the atmospheric concentration of greenhouse gases responsible for climate change), in ENVIRONMENTAL ETHICS: READINGS IN THEORY AND APPLICATION, *supra* note 119, at 437, 438–39.

¹⁵⁷ See *id.* at 438 (“[E]xisting species are unlikely to be able to adapt quickly and easily under [an enhanced greenhouse gas effect]”); Gerardo Ceballos et al., *Accelerated Modern Human-Induced Species Losses: Entering the Sixth Mass Extinction*, *SCI. ADVANCES*, June 19, 2015, at 1, 3, <http://advances.sciencemag.org/content/1/5/e1400253.full.pdf+html> [<https://perma.cc/H95W-6SJV>] (accessed Dec. 20, 2016) (“[A]lthough biologists cannot say precisely how many species there are, or exactly how many have gone extinct in any time interval, we can confidently conclude that modern extinction rates are exceptionally high, that they are increasing, and that they suggest a mass extinction under way—the sixth of its kind in Earth’s 4.5 billion years of history.”).

¹⁵⁸ Gardiner, *supra* note 156, at 455 (“tragic” aspects of ignoring effects).

¹⁵⁹ GOODALL, *supra* note 120, at 103–08 (describing a four-year “war” of annihilation between two chimpanzee groups).

¹⁶⁰ *Id.* at xi.

stressed that, despite occasional organized brutality, group violence is an aberration in an otherwise largely peaceful species.¹⁶¹

Aside from group violence, predatory animals, which of course include humans, survive by killing prey for food and defense. This kind of killing is not intended to inflict suffering, although that is the result.¹⁶² Proponents of unique human dignity have argued that animals cannot be held morally responsible for their actions because they are incapable of evaluative reasoning and acting on that basis.¹⁶³ Recently, blue jays in my yard stalked, killed, and probably consumed the babies of a nesting wren. Despite repugnance, I could not rationally condemn the killer birds. Even proponents of animal rights have distinguished between “moral agents” and animal “moral patients,” arguing that humans have asymmetrical moral obligations to nonhumans, who themselves owe no moral duties.¹⁶⁴

Despite significant differences between human morality within deliberate communities and the empathy and altruism that animals exhibit, a strict dichotomy of agents and patients is softening through ethological research.¹⁶⁵ Alternatively, morality emerges more on a continuum, making human moral uniqueness more a matter of degree than kind.¹⁶⁶ Notions of human superiority go out with the uniqueness theory.

In summary, moral capacity may not be a necessary component of dignity, although it surely guides the treatment of beings with dignity. Even if one insists on the necessity of morality, however, many animals display cooperation, empathy, helping behavior, and altruism both within and outside of their species and social groups. Finally, even if morality is necessary to dignity, and only humans possess developed moral capacities, this does not imply human superiority over nonhumans. Indeed, humans may have evolved distinctively complex morality to keep them from destroying themselves and the planet, given their ubiquitous violence and devastation.

IV. CAPACITIES AND ANIMAL DIGNITY

A. *Animal Capacities and Critique*

A promising approach to animal dignity has a precursor in environmental ethics. The idea that living individuals possess interests in

¹⁶¹ *Id.* at 210.

¹⁶² *See, e.g.*, Singer, *supra* note 38, at 43 (arguing that predators kill for survival and therefore are not morally responsible); *see also* GARY E. VARNER, IN NATURE’S INTERESTS?: INTERESTS, ANIMAL RIGHTS, AND ENVIRONMENTAL ETHICS 114 (2d prtg. 2002) (describing the view that predator killing is not morally wrong).

¹⁶³ *See, e.g.*, KATEB, *supra* note 2, at 117, 119 (distinguishing between the “minds” of human and nature).

¹⁶⁴ REGAN, *supra* note 38, at 20–21, 151–53.

¹⁶⁵ *See, e.g.*, BEKOFF & PIERCE, *supra* note 144, at xi, xiv, 144–45 (recognizing more continuity along a moral continuum than previously thought).

¹⁶⁶ *Id.*

developing according to norms for their species or kind is the basis for what is known as a capacities approach to animal ethics. Although Paul Taylor is not the only environmental philosopher who earlier developed a similar idea, his ethical views are carefully developed, and I will concentrate on them. Then, I will consider the work of Martha Nussbaum, who explicitly has tied animal dignity to species-based capacities that are typically important to individual animal flourishing. I argue that the capacities view is relevant mostly to generating prospective moral and policy guidelines for how animals with dignity should be treated, but that the theory does not comprehensively explain the components of animal dignity or provide much particular guidance for the myriad situations facing existing animals in their varied relations with humans. I point out some problems with the approach as applied to animals that may prove difficult to remedy.

Naturalism in the field of environmental ethics has affinity with the animal capacities approach. By ‘naturalism,’ I here refer to the broad notion that ethical judgments are based in part on observable biological attributes of living beings and systems. Another philosophical way of saying this is that environmental ethics has never reflected as strict a division between the ‘is’ and ‘ought,’ the descriptive and normative, as moral philosophy generally accepts.¹⁶⁷ Environmental ethics has moved further from this dualism than other fields of ethics because of the undeniable relevance of ecological, biological, and other scientific facts to developing environmental norms.

Paul Taylor’s “biocentric egalitarian” theory of ethics justifies his overarching view that the appropriate moral attitude toward the natural world is respect.¹⁶⁸ According to Taylor, “every organism, species population, and community of life has a good of its own” that humans affect.¹⁶⁹ Taylor viewed “basic interests” of all living individuals, including plants, as intrinsically valuable.¹⁷⁰ This value is not reducible to usefulness to humans but rather must be viewed from the perspective of the individual “teleological center of a life.”¹⁷¹ The norms vary according to what it takes for an individual being to have a good life, not from standards important to humans, such as the capacity for moral deliberation and accountability.¹⁷² Taylor poses a provocative question: “After all, various nonhuman species have capacities that humans lack. There is the speed of a cheetah, the vision of an eagle, the agility of a monkey. Why should not these be taken as signs of *their*

¹⁶⁷ See, e.g., John Stuart Mill, *Nature* (arguing that people ought not emulate nature), in ENVIRONMENTAL ETHICS: READINGS IN THEORY AND APPLICATION, *supra* note 119, at 122, 127–29.

¹⁶⁸ Taylor, *supra* note 119, at 209.

¹⁶⁹ *Id.* at 207.

¹⁷⁰ *Id.* at 207–08.

¹⁷¹ *Id.* at 212.

¹⁷² See *id.* at 207 (“To say that an entity has a good of its own is simply to say that, without reference to any *other* entity, it can be benefited or harmed.”).

superiority over humans?"¹⁷³ Thus Taylor rejects the hierarchical view of species upon which modern notions of human dignity depend and instead emphasizes the diverse ways living individuals pursue their distinctive goods. This opens animal dignity to contextual flexibility instead of tying it to a comparative human framework.

Before she specifically addressed animal dignity, philosopher Martha Nussbaum developed a theory of political human rights based on human capacities required to lead a flourishing life.¹⁷⁴ Nussbaum is clear, however, that her view is not reducible to human nature.¹⁷⁵ She contends that her view of capacities is evaluative in identifying only capacities that facilitate a life worth living.¹⁷⁶ Cooperation or living together is an important component of worth, so opportunities for aggression are not on the capacities list, even though humans have demonstrated such behavior throughout history.¹⁷⁷ Nussbaum also claims that her theory applies to individual humans and their ability to flourish rather than to the human species collectively,¹⁷⁸ even though she derives the capacities from biology and characteristics of *Homo sapiens* as a whole.¹⁷⁹ Nussbaum identifies ten human capacities, which she indicates is a flexible and dynamic list.¹⁸⁰

According to Nussbaum, a state has the obligation to provide every person with opportunities to realize these capacities within individualized constraints and choices.¹⁸¹ A cognitively disabled person, for example, would not be able to achieve a high level of mental functioning, but should be assisted in developing a level of cognition situated to his or her potential.¹⁸² Nussbaum insists that it is not the government's role to guarantee that every person function up to her capacities, and that people should have freedom to choose to forego such opportunities.¹⁸³ While the capacities straddle time and culture, creating something close to universal rights, Nussbaum leaves considerable room for individual and group variation.¹⁸⁴

¹⁷³ *Id.* at 215.

¹⁷⁴ See generally NUSSBAUM, *supra* note 13, at 76–78 (describing the basics of Nussbaum's political theory).

¹⁷⁵ *Id.* at 82, 94, 366.

¹⁷⁶ *Id.*

¹⁷⁷ See *id.* at 350, 366, 370 (arguing that justice is consistent with flourishing).

¹⁷⁸ *Id.* at 357–58.

¹⁷⁹ See *id.* at 358–59, 362–63 (discussing how various forms of life determine conditions of welfare).

¹⁸⁰ Nussbaum's Human Capabilities list is abbreviated as follows: (1) Life, (2) Bodily Health, (3) Bodily Integrity, (4) Senses, Imagination, and Thought, (5) Emotions, (6) Practical Reason, (7) Affiliation, (8) Other Species, (9) Play, and (10) Control over One's Environment. *Id.* at 76–78.

¹⁸¹ See *id.* at 82 (suggesting legal, political, and economic implementation).

¹⁸² See, e.g., *id.* at 187–89 (arguing for suitable opportunities for a cognitively disabled person).

¹⁸³ See *id.* at 80 ("My own view is that people should be given ample opportunities to lead a healthy lifestyle, but the choice should be left up to them; they should not be penalized for unhealthy choices.").

¹⁸⁴ *Id.* at 78–79.

More recently, Nussbaum has applied her theory of capacities to nonhuman animals. Because of the biological and evolutionary continuities among animals of all kinds, including humans, but also their species-related differences, this move is promising. According to Nussbaum, capabilities are the basis of animal dignity, which she concedes is a difficult idea to apply.¹⁸⁵ The actual list Nussbaum generates builds on her previous list for humans. The ten basic animal capabilities she lists turn out to be the same as those for humans, although elaborated differently: (1) Life, (2) Bodily Health, (3) Bodily Integrity, (4) Senses, Imagination, and Thought, (5) Emotions, (6) Practical Reason, (7) Affiliation, (8) Other Species, (9) Play, and (10) Control over One's Environment.¹⁸⁶

It is difficult to tell just what Nussbaum means by dignity within the capacities framework, and she never explains the idea. Although the idea might have no invariable essence, but rather a cluster of overlapping attributes such as those discussed earlier with human dignity, Nussbaum does not elaborate dignity traits. She mentions that the human capabilities approach “starts from the notion of human dignity and a life worthy of it,” referring to the “basic moral intuition . . . of the dignity of a form of life that possesses both abilities and deep needs.”¹⁸⁷ This gives the impression that the capacities themselves define dignity, treated as a source of value and respect,¹⁸⁸ but at other times Nussbaum speaks of dignity as a set of “core entitlements” or rights.¹⁸⁹ Such a central idea needs clarification.

For several reasons, Nussbaum is not entirely successful in transferring her theory of human capacities to nonhuman animals. One reason is practical but really important to the workability of her theory in particular situations. A separate list of capacities would need to be developed for each animal species that would identify the characteristic flourishing of that kind of being.¹⁹⁰

First, the boundaries among species are notoriously fuzzy, and most scientists admit that lines drawn are somewhat arbitrary.¹⁹¹ Second, many species are yet to be discovered, and humans are influencing species' continued existence now.¹⁹² An ethic should not depend on

¹⁸⁵ *Id.* at 325–26.

¹⁸⁶ *Id.* at 393–401.

¹⁸⁷ *Id.* at 346.

¹⁸⁸ *Id.* at 340.

¹⁸⁹ *Id.* at 78.

¹⁹⁰ *Id.* at 363, 368–69.

¹⁹¹ See, e.g., JENNIFER A. MATHER ET AL., OCTOPUS: THE OCEAN'S INTELLIGENT INVERTEBRATE 19 (2010) (“A species is an interbreeding group of animals that doesn't interbreed with other groups, and this can change . . . [resulting in uncertainty regarding] what species [scientists] are working with.”); EDWARD L. MCCORD, THE VALUE OF SPECIES 2 (2012) (explaining that “species . . . mean[s] the kinds into which biologists divide living things as the best account of the nature of existence, the best explanatory typology”).

¹⁹² See, e.g., Traci Watson, *86 Percent of Earth's Species Still Unknown?*, NAT'L GEOGRAPHIC NEWS (Aug. 25, 2011), <http://news.nationalgeographic.com/news/2011/08/>

information about characteristic functioning of myriad creatures, nor assume that knowledge of diverse species will ever be rich enough to catalog particular varying capacities. Third, species norms evolve, so capacities change in dimension and importance, making them a moving target, and Nussbaum acknowledges the open-ended aspects of her theory.¹⁹³ She does not address the powerful practical obstacles the theory faces for the vast majority of unstudied nonhuman species. The capacities approach is not comprehensive although it is useful for familiar animals accessible to human observers. It is important to recognize these limitations.

Finally, the abstraction of species does not capture the vast differences of individuals based on their particular circumstances and varying relations with humans. The needs and preferences of a feral cat differ dramatically from those of Fing, who thrived on contact with people she knew. Nussbaum maintains that the capacities approach is about opportunities each animal should have in accordance with “species norms.”¹⁹⁴ Although cats evolved as domesticated animals, it would not make sense to provide a homeless cat with opportunities to live indoors or develop human relations if feral existence has become central to its identity and mode of living. Such contextual differences can render species generalities inflexible, even for familiar species with known capacities.

The most serious objection to Nussbaum’s capacities theory as applied to nonhuman animals is her insistence that, as with humans, the list of capacities is normative, rather than merely a description of nature.¹⁹⁵ Nussbaum does not say exactly how she derives her list, however, leaving open questions of whether the list is based on consensus,¹⁹⁶ a calculation of best overall good,¹⁹⁷ or some unidentified source of moral intuition.¹⁹⁸

The challenges of compiling a list of worthwhile capacities are compounded considerably with nonhumans. Selecting which traits are desirable for flourishing is particularly vulnerable to arbitrariness and

110824-earths-species-8-7-million-biology-planet-animals-science/ [https://perma.cc/8VGU-SJTR] (accessed Dec. 20, 2016) (explaining that according to a new study “scientists have cataloged less than 15 percent of species now alive . . . [and] extinction rates have accelerated to ten to a hundred times their natural level”).

¹⁹³ See NUSSBAUM, *supra* note 13, at 352–53 (“We hold nothing fixed; we seek consistency and fit among theory and judgments taken as a group . . . and it is likely that all our emphatic imagining of the experiences of animals is shaped by our human sense of life.”).

¹⁹⁴ See *id.* at 363 (“The possibilities of flourishing in [a] community are defined around species norms.”).

¹⁹⁵ *Id.* at 82, 94, 366.

¹⁹⁶ See *id.* at 388 (attributing the idea of an “overlapping consensus of the reasonable comprehensive doctrines” to the capabilities approach).

¹⁹⁷ See *id.* at 342–43 (rejecting the harshness of the utilitarian approach to small groups).

¹⁹⁸ See *id.* at 70, 326, 346, 352, 367 (discussing difficulties in defining intuitive and elusive ideas of dignity for humans and animals).

projection of human values onto nonhuman life, which Nussbaum herself recognizes.¹⁹⁹ She considers whether killing for food should be among the ingredients of a flourishing life of a predatory animal.²⁰⁰ At one point she seems to accept predation for wild beings left largely to autonomous living,²⁰¹ but she later suggests that a tiger's fictional trustee could pronounce the animal's pursuit of gazelles "unreasonable."²⁰² Nussbaum definitely favors non-violent alternatives for captive predators, using the example of a zoo tiger satisfying its predatory capacities chasing a ball on a rope.²⁰³ This raises questions about altering the central nature of an animal to suit human norms.

Yet, if depredation is included on the capacities list for predators like wolves, for example, it is hard to see how a capacities list for *Canis lupus* (or some other species of wolf) is more than a description of animal nature. Without explicit normative criteria for selecting among traits, evaluating animal capacities appears arbitrary.

Other examples illustrate the difficulty of creating a normative theory of animal capacities. Many animals consume their young.²⁰⁴ I once watched with horror a red squirrel devouring a writhing baby. One Public Broadcasting program, *Nature*, depicts a zebra stallion brutally killing a young zebra while the mother wails and tries desperately to save her colt.²⁰⁵ The practice of cannibalizing offspring may have value to natural selection, population control, or other functions not fully understood.²⁰⁶ Yet it is doubtful that infanticide would appear on anyone's capabilities list as a way of controlling animal fitness across generations because the practice is abhorrent by human standards.

Nussbaum's insistence on an individualized approach to animal capabilities is flexible and inclusive because it does not leave out exceptional individuals. Applying the theory in this manner requires particular knowledge of individuals that would work better in some contexts than others, however. For example, small farmers might

¹⁹⁹ *Id.* at 354, 370.

²⁰⁰ *See id.* at 369–70 (explaining that "the capabilities theorist will have a strong inclination to say that . . . harm-causing capabilities are not among those that should be protected[,] . . . [b]ut to say this . . . would require us to judge that these capabilities . . . are not central to the ability of the creature to live a flourishing . . . life . . . and [that] judgment . . . is difficult to make.").

²⁰¹ *See id.* at 379 ("[T]he needs of the predatory animal must also be considered . . .").

²⁰² *Id.* at 390.

²⁰³ *Id.* at 371.

²⁰⁴ *See, e.g.,* Stephen T. Emlen, *Ethics and Experimentation: Hard Choices for the Field Ornithologist* (discussing that infanticide "occurs commonly in a wide variety of species"), in *THE ANIMAL ETHICS READER*, *supra* note 38, at 360, 361.

²⁰⁵ Rodentobob, *Great Zebra Exodus—PBS Nature Documentary* at 43:24, YouTube (May 5, 2016), https://www.youtube.com/watch?v=RU_JoBm0Xn8 (accessed Dec. 20, 2016).

²⁰⁶ Anna-Louise Taylor, *Why Infanticide Can Benefit Animals*, BBC NATURE, (May 21, 2012, 2:33 AM), <http://www.bbc.co.uk/nature/18035811> [<https://perma.cc/ZHT8-EMGQ>] (accessed Dec. 20, 2016).

know their barnyard animals as individuals (although not the typical model in the current climate of industrial farming). I knew a farmer in rural Maine who used only horses to cultivate his land. He named his horses and knew their unique qualities. When Dolly slipped into a partially frozen brook on Christmas Eve, Bill knew that her unusual fear of water would obstruct her rescue. Based on that particularized understanding, Bill enlisted the assistance of friends to urge her out of the water. Dolly did not fare well. She was elderly, underfed, and was unable to survive her ordeal despite the food and blankets her rescuers provided. Dolly existed in a chronically deprived condition. Bill cared for her as well as his resources permitted, but he was among Maine's largely hidden rural poor. He was visibly aged well beyond his fifty-seven years, lived in a rented dilapidated house without running water, electricity, or heat, and several times endured hospital stays as a charity patient on the brink of death from pneumonia. Few modern farmers used animal labor at the time, even in the impoverished wilds of Maine, so no one else could provide Dolly with species opportunities according to her training and skills. She and Bill had a longstanding relationship, and it is difficult to conclude that Bill denied her individual capacities within the framework of scarcity that sealed their shared potential.

Animals in the wild are much more difficult to individualize than Dolly. Notwithstanding the close familiarity wildlife managers had with the gray wolf packs reintroduced into Yellowstone National Park in the mid-'90s,²⁰⁷ most wild animals are not closely monitored. For them, a capacities approach would be largely species-based and not individualized enough to accommodate ostracized or defective animals. This raises some doubts about the usefulness of the capacities approach in some animal contexts, particularly the wild. A lone wolf provided opportunities to mingle with members of its highly social species might be attacked or worse. Yet, the circumstances of a solitary wolf would shrink its capacities.²⁰⁸ Freedom to pursue an aberrant lifestyle is important in recognizing animal individuality and dignity.²⁰⁹ Nussbaum might claim that a wolf selecting a non-social existence in defiance of its species' norms is not deprived of opportunities to realize its animal capacities. The concept of opportunity is normatively more difficult, however, if other wolves shun or aggressively reject the wolf.

Still more perplexing are marine animal lives, even the charismatic mammals people value and know best. Thomas I. White reinforces Diana Reiss's description of dolphins as an "alien

²⁰⁷ See, e.g., THOMAS McNAMEE, *THE RETURN OF THE WOLF TO YELLOWSTONE* 320 (1997) (quoting one project leader, Mike Phillips, who said, "I'm starting to feel like a damned zookeeper.")

²⁰⁸ See BEKOFF, *supra* note 83, at 106 (describing the advantages of pack living).

²⁰⁹ See, e.g., NICK JANS, *A WOLF CALLED ROMEO* (2014) (telling the story of a solitary Alaskan wolf who preferred dogs and humans to wolves and seemingly adopted that lifestyle by choice).

intelligence.²¹⁰ Dolphins inhabit a water world incomprehensible in human experience,²¹¹ and their physiology differs accordingly.²¹² Significantly, dolphins use echolocation to obtain auditory information about their environment and other dolphins,²¹³ whereas humans depend more on language and visual cues to assess and communicate with others.²¹⁴ Despite fairly extensive research on dolphins, humans can only imagine how marine species perceive their world and carry on a flourishing life.

B. Breaking Species Bounds: Dignity as Capacities Belied

Another problem with relying on typical species characteristics is explaining and validating the seemingly extraordinary conduct of some animals. Recently the story of Mr. G and Jellybean ‘went viral.’ Mr. G is a goat raised for ten years with a donkey named Jellybean.²¹⁵ Animal welfare agents removed both animals from a neglect situation and placed them in separate rescue facilities.²¹⁶ Mr. G failed to thrive. He refused to eat and remained huddled and largely motionless in a dark corner of his pen.²¹⁷ As a last resort to save Mr. G, one of Jellybean’s keepers drove many hours to retrieve Mr. G by truck.²¹⁸ Upon being reunited, the friends were exuberant, and almost instantaneously Mr. G began to recover.²¹⁹ Part of the fascination with stories like this is that animals are behaving in some way *outside of* our expectations of their capacities. Although most people accept friendship among animals, few would expect the extreme attachment that Mr. G had for Jellybean, an animal not even a member of his species, even to the point of overwhelming his instincts for survival. Sometimes the independent act of exceeding species-based capacities is precisely what we deem the dignity of nonhuman animals.

Percy is an ‘ordinary’ cat who lives in Scarborough, England.²²⁰ He made the front page of the local newspaper because of a special

²¹⁰ WHITE, *supra* note 18, at 12 (citing Diana Reiss, *The Dolphin: An Alien Intelligence*, in *FIRST CONTACT: THE SEARCH FOR EXTRATERRESTRIAL INTELLIGENCE* 32 (Ben Bova & Byron Preiss eds., 1990)).

²¹¹ *Id.*

²¹² *See id.* at 19–20, 170 (explaining the various differences between dolphin and human physiology).

²¹³ *Id.* at 21.

²¹⁴ *Id.* at 26, 168.

²¹⁵ Ed Mazza, *Depressed Goat Mr. G Won’t Eat Until He’s Reunited with His Donkey Best Friend Jellybean*, HUFFINGTON POST (May 26, 2014, 5:44 AM), http://www.huffingtonpost.com/2014/05/26/depressed-goat_n_5391433.html [https://perma.cc/AH55-EPMA] (accessed Dec. 20, 2016).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Animal Place, *Mr. G and Jellybean*, YOUTUBE (May 20, 2014), <https://www.youtube.com/watch?v=bv2OGph5Kec> (accessed Dec. 20, 2016).

²²⁰ *Meet Percy—The Cat Who Travels by Train to Watch the Fish at Marine Life Centre*, YORKSHIRE POST (Oct. 19, 2009, 5:57 PM), <http://www.yorkshirepost.co.uk/news/>

activity.²²¹ Percy regularly boarded a trolley near his yard at the same time each day.²²² He departed the train at the aquarium stop, where he waited for the facility to open and entered with the stream of human visitors.²²³ Once inside, Percy made the round of exhibits, settling on the penguin display.²²⁴ At closing time, Percy made his way to the trolley, boarded, and disembarked at the stop nearest home.²²⁵ This story is remarkable precisely because Percy has done things no one (even his surprised humans!) would expect of a cat. His behavior is analogous to a human acting ‘out of character.’ People reassess the character of a normally cowardly person who risks her life to rescue another, or an honest person who lies. Percy’s case supports a highly individualized approach to animal capacities, which are harder to calibrate than the exceptional capacities of *Homo sapiens*.

Animal ethicists of different theoretical persuasions draw lines based on species-typical attributes. For Tom Regan, experiencing “subjects-of-a-life” who have conscious attributes like “beliefs and desires; perception, memory, and a sense of the future” are entitled to rights.²²⁶ For Peter Singer, on the other hand, any sentient animal capable of feeling pleasure and pain deserves equal moral consideration.²²⁷ Both Regan and Singer have claimed that equal moral consideration is distinct from equal treatment.²²⁸ For Singer, this is because beings that contemplate death and other complex ideas of self have a greater capacity to suffer.²²⁹ For Regan, the varying sophistication of conscious experience justifies differing treatment.²³⁰ Nussbaum also adapts the human capacities approach to include disabled people and sets priorities for ethical treatment based on these differences.²³¹ It is far less feasible to create this kind of flexibility for most animals given limited knowledge of species and lack of exposure to individuals.

Few animal ethicists have included invertebrates within the scope of required moral concern. Yet the octopus is turning out to astound

meet-percy-the-cat-who-travels-by-train-to-watch-the-fish-at-marine-life-centre-1-2307213 [https://perma.cc/K9ZU-MDDH] (accessed Dec. 20, 2016).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ REGAN, *supra* note 38, at 22.

²²⁷ Singer, *supra* note 38, at 37.

²²⁸ *See id.* (“If a being suffers, there can be no moral justification for refusing to take that suffering into consideration.”); REGAN, *supra* note 38, at 25 (supporting intuition that treatment can vary according to subject’s capacity to experience greater or lesser harm).

²²⁹ *See* Singer, *supra* note 38, at 44–45 (asserting that killing animals intelligent enough to perceive suffering is a greater wrong than killing those without).

²³⁰ *See* REGAN, *supra* note 38, at 25 (claiming that animal deaths are a lesser harm than human deaths).

²³¹ NUSSBAUM, *supra* note 13, at 187–89.

those who have confined animal intelligence to vertebrates.²³² Within the class of cephalopods, the octopus displays remarkable prowess, despite not having a central nervous system or brain comparable to a human brain.²³³ We now know that these creatures use tools, like rocks, piled to control the size of their den entrance,²³⁴ and can form relationships with people despite their mostly solitary nature in the wild.²³⁵ A student of mine who had majored in biology worked in a research aquarium that studied marine creatures.²³⁶ She told the class an amazing story about an octopus who resided in one of the tanks. Keepers fed the creature from a large, lidded jar containing fresh food. They began to notice that the jar was empty most mornings despite containing surplus food. They decided to film the area at night to determine how the food was disappearing. The culprit was the octopus, who attached itself to the jar, unscrewed the lid, and dumped the contents into the tank for consumption. Most remarkably, the creature then screwed the lid back on the jar, leaving no indication of tampering. This last step (of deception?) did not affect the immediate availability of food, but it seems to indicate a purpose to prolong access to the jar in the future.

I learned later that such behavior is not unusual and can even include success with childproof caps!²³⁷ Biologists who study octopuses place screw-top glass jars in aquarium tanks for observation and enrichment.²³⁸ One researcher reported that a particular octopus expressed its displeasure at being fed less than fresh squid and shrimp.²³⁹ The researcher reported that the octopus made eye contact and followed her gaze while it proceeded to dispose of the unwanted offering down the drain at the center of the tank.²⁴⁰ Such displays of apparent intelligence, emotion, and awareness of other minds are not considered characteristic of cephalopods which have completely different brain structures from humans.²⁴¹

So little is known about many invertebrate creatures of the sea that a capacities approach to dignity loses some of its meaning and

²³² See MATHER ET AL., *supra* note 191, at 115 (describing former view that octopuses were merely “tissue”).

²³³ See John Roach, *Octopus Arms Found to Have “Minds” of Their Own*, NAT’L GEOGRAPHIC NEWS (Sept. 7, 2001), http://news.nationalgeographic.com/news/2001/09/0907_octoarm.html [<https://perma.cc/X8R9-SRUF>] (accessed Dec. 20, 2016) (describing separate nerves in eight arms connected to the octopus’s brain).

²³⁴ MATHER ET AL., *supra* note 191, at 125.

²³⁵ SY MONTGOMERY, *THE SOUL OF AN OCTOPUS: A SURPRISING EXPLORATION INTO THE WONDER OF CONSCIOUSNESS* 9, 81 (2015).

²³⁶ Emily Rochler was the student who told this story.

²³⁷ MONTGOMERY, *supra* note 235, at 53.

²³⁸ See MATHER ET AL., *supra* note 191, at 127–28 (observing octopus play behavior with screw-top glass jars).

²³⁹ LINDEN, *supra* note 126, at 42–43.

²⁴⁰ *Id.* at 43.

²⁴¹ See *id.* at 28, 34 (noting that, in vivid contrast to the isolated human brain, octopus arms contain neurons).

utility in that setting. For marine mammals the approach works better because of mammal commonalities and human interest in beings ‘like us.’ Even the most favored, like dolphins, however, live ultimately unbridgeable lives. Similar to the ‘personhood’ approach, evaluating animal capacities tends to confer greater moral standing on those beings most understandable to humans, a probable conceptual bias. How many beings of the deep possess capacities unfathomed, and how would we ever establish a workable capacities ethic for them?

A capacities approach to animal dignity reminds us that species differences matter to animal lives. Species norms are useful in directing broad policy regarding animal needs and in prospectively designing favorable conditions for captives. The theory justifies moral consideration of nonhuman animals, and by implication, derives a foundation for legal standing from the moral ideal. The capacities view, standing alone, does not offer a full enough understanding of the dignity of exceptional and unfamiliar animal individuals. Species capabilities lend some content to the idea of animal dignity, but the idea is broader and needs attention in its own right.

V. THE MORAL IMPLICATIONS OF ANIMAL DIGNITY

A. Preliminaries

1. *Summary So Far*

So far I have discussed the idea of human dignity as inviolable and the basis of universal human rights. Apparently with contradiction, I considered violations of dignity through degradation and humility and differences in individual dignity related to capacities and functioning. I examined the substance of human dignity in the attributes of consciousness, thinking, self-awareness, agency, and moral agency. I noted the two-sided aspect of dignity as these inward characteristics, but also dignity as the manner in which one presents oneself to the world. I considered the attributes of dignity in nonhumans, with the assistance of burgeoning scientific research dispelling the claim that humans uniquely possess these traits that supposedly set humans apart and make them superior. I then considered a capacities approach to animal dignity, discussing its merits and limitations.

2. *Varying Notions of Dignity Are Not Necessarily Inconsistent*

I think that dignity is a coherent idea despite its differing manifestations and that this has significance for both human and animal dignity as a rich and useful idea across many contexts. When people claim that all humans possess dignity, they are making a normative claim about rights. This is not inconsistent with saying that some entity or person can damage dignity, or that a person can diminish her own dignity. Nor is it at odds with the idea that people may possess a different quality, type, or extent of dignity, or that some expressions

cannot be evaluated as superior to others. Universal dignity is simply a minimum threshold to which every individual is entitled.

These points may seem obvious, but they have caused people to assert that the idea is incoherent or empty and thus not a meaningful basis for important social guarantees.²⁴² Rehabilitating the idea is important to its foundational status in human rights, and appreciating its complexity and richness offers possibilities for a parallel role in securing more than paltry protections for animals. Dignity interests are not identical in humans and animals, as they are not in humans despite a universal minimum. Humans are remiss in disregarding animal dignity, and examining the idea is valuable to both human and animal rights.

B. Elaborating Animal Dignity in Concrete Contexts

Now I turn to the difficult task of discussing some implications of animal dignity for morality and law. This discussion can only be preliminary because of the importance of context and variety in defining dignified treatment of animals. The living beings on Earth differ considerably in biological needs and characteristic functioning, which presents the first obstacle to any comprehensive view. Individual dignity is often tied to *uncharacteristic* functioning, however, and the exceptional qualities of individuals must find space in a credible theory. Compounding that, the vastly different circumstances of diverse beings are relevant to their particular dignity. Re-wilding a captive animal may mean a failure to thrive or even survive, which also constrains the expression of dignity. Because of extreme variations, the most I can do here is to make preliminary suggestions about some common contexts in which humans affect animal dignity for better or worse, and try to extrapolate some flexible guidelines for future cases. I focus here on the closest animal relations with humans. Animals largely independent in the wild also have numerous and diverse dignity interests, which I leave for another occasion. Because I am concerned with dignity, I may bypass important harms to animal welfare that others have discussed. Animal dignity is a partial foundation for animal ethics.

VI. ANIMALS UNDER NEARLY COMPLETE HUMAN CONTROL

On a continuum from considerable independence to full dependency, humans owe the highest ethical obligations to animals on the latter end with whom they have direct relations. Placing (coercing) a living being into a relationship of nearly full control deprives that individual of the ability to meet its needs for survival, let alone flourish.

²⁴² See, e.g., ROSEN, *supra* note 3, at 6 (discussing the view that the idea is a “mere receptacle” with no meaning); Ruth Macklin, *Dignity Is a Useless Concept*, 327 BRIT. MED. J. 1419, 1419–20 (2003) (arguing that its meaning is reducible to respect for autonomy); Stoecker, *supra* note 7, at 7 (discussing moral philosophers’ disregard of the idea as incoherent).

Stripped of natural agency, these animals lack freedom and choice. The special, asymmetrical relationship of power over animals generates stringent duties on humans, as beings with ethical capacity, to meet the basic needs of those dependents for food, shelter, appropriate temperature conditions, and hygiene. The relationship also imposes duties to respect the captives as conscious, emoting, curious, and social or solitary beings with preferences and personalities. The high standard of care for domesticated animals is reflected in the laws of every state that prohibit cruelty to animals and extreme neglect, and that typically impose criminal penalties for infringement.²⁴³ Although these laws are notoriously under-enforced,²⁴⁴ their existence shows threshold acceptance of at least some human moral duties to animals in captivity. Injecting dignity into the rationale for animal welfare legislation would support fuller protection of animal interests. Legislators, lawyers, and judges should begin to discuss the specific components of animal dignity as a reason for protecting animal welfare.

A. *Pets*

I start here because this is probably the arena where people most readily acknowledge their moral responsibilities. People choose to enter into these relations mostly for companionship and emotional value, although of course pets also may have instrumental value in providing services like protection, support for disabilities, and even commercial gain in the case of breeding. Some have argued that having pets in the first place is wrong, and that the practice should end over time.²⁴⁵ Pets have no choice in the matter and are rendered abjectly dependent on humans and subject to varying human will, commitment, and resources.²⁴⁶

Perhaps Fing's status as a pet, fully dependent on humans for survival and stimulation, made her enjoy being a dressed cat.²⁴⁷ These would be "adaptive preferences" because the inherent constraints of Fing's situation limited her expectations.²⁴⁸ Humans have bred cats and dogs to produce traits of docility and friendliness that enhance their dependence.²⁴⁹ Pet 'parents' would respond that the relationship

²⁴³ See SONIA S. WAISMAN ET AL., *ANIMAL LAW: CASES AND MATERIALS* 65, 72 (5th ed. 2014) (explaining that every state has a set of anti-cruelty statutes, and at least one felony anti-cruelty law).

²⁴⁴ See *id.* at 74–75 (explaining that issues such as exemptions, lack of police training, and lack of funding contribute to insufficient enforcement of animal cruelty laws).

²⁴⁵ See, e.g., Gary L. Francione, "Pets": *The Inherent Problems of Domestication*, *ANIMAL RIGHTS: THE ABOLITIONIST APPROACH* (July 31, 2012), <http://www.abolitionistapproach.com/pets-the-inherent-problems-of-domestication/> [<https://perma.cc/M48Q-UJL7>] (accessed Dec. 20, 2011) (arguing that pet ownership is against animal rights).

²⁴⁶ *Id.*

²⁴⁷ See *supra* pp. 14–15.

²⁴⁸ See, e.g., NUSSBAUM, *supra* note 13, at 73 (explaining the concept of adaptive preferences, in which the choices of oppressed people are limited by the status quo).

²⁴⁹ Francione, *supra* note 245.

is often mutually beneficial beyond basic needs because animal and human develop reciprocal affection and loyalty.²⁵⁰ Although the relationship can produce friendship, joy, and compassion, its asymmetrical power places a heavy burden of justification on the human, and parents should teach their children that acts demeaning a pet should be avoided even if the animal does not appear to mind.

Despite the merits of these points about coerced dependency, I do not think pet relations are inherently unjustified. Many of these animals are bred to be docile companions of humans, and it is difficult to conclude that those among them whose needs are fully satisfied, and are treated kindly and with affection, lead unacceptable lives. Animal and human companionship appears to provide mutual benefits, which in many cases are great.²⁵¹ The increasing importance of pets in human lives has most likely contributed to changing attitudes toward animals generally as people appreciate the personalities and complexities of nonhumans.

Dignity issues do infect pet relationships, however, beyond welfare issues of mistreatment and neglect that offend animal sentience. First, humans breed animals, like dogs and cats, to alter their physical and personality attributes according to human standards of aesthetics. Some animals suffer congenital defects from these breeding practices, injuring the animals' welfare.²⁵² English bulldogs, for example, have difficulty giving birth because of the short legs in relation to body that result in the dog's unusual gait.²⁵³ Breeding living beings as ornaments to serve human whims, sometimes bordering on comedic, offends dignity despite loving relationships. Such affronts to dignity are separate from those abused pets suffer.

B. Zoos

Philosopher Dale Jamieson discredits the claim that captive-born animals do not miss autonomous life in the wild they have never known.²⁵⁴ He argues that this very ignorance enhances the loss for animals deprived of experiences that would be typical outside of captivity.²⁵⁵

²⁵⁰ *Travis v. Murray*, 977 N.Y.S.2d 621, 625 (N.Y. Sup. Ct. 2013) ("Where once a dog was considered a nice accompaniment to a family unit, it is now seen as an actual member of that family, vying for importance alongside children.").

²⁵¹ *Id.*

²⁵² See, e.g., Archie Bland, *The Big Question: Is the Breeding of Pedigree Dogs Leading to Cruel Abnormalities?*, INDEPENDENT (Aug. 19, 2008), <http://www.independent.co.uk/news/uk/this-britain/the-big-question-is-the-breeding-of-pedigree-dogs-leading-to-cruel-abnormalities-902853.html> [<https://perma.cc/D6PN-HTU6>] (accessed Dec. 20, 2016) (discussing painful problems in Bassett hounds, bulldogs, and pugs).

²⁵³ *Id.*

²⁵⁴ Dale Jamieson, *Against Zoos*, in THE ANIMAL ETHICS READER, *supra* note 38, at 507, 507–08.

²⁵⁵ *Id.*

This is so even if zoo advocates can show that the zoo environment protects animals from the ravages of predation, disease, early death, and other harms they would face in the wild.²⁵⁶ Besides welfare, zoos damage the dignity interests of otherwise wild animals by stripping them of choices about habitat, obtaining food, choosing to reproduce, and forming relationships with other animals. This impairs the important agency strain of dignity.

The facilities also restrict animals' ability to avoid humans and seek the security of private locations, a feature of autonomy important to dignity. Even better zoos that provide opportunities for animals to conceal themselves deny to animals the overall choice to be solitary or select particular animal companionship. Extensive human access to animals disrespects privacy interests that we attribute to humans. Most people would not consider a life of constant supervision, even meeting basic needs and enrichment, a life of dignity. This monitoring is in part why imprisoning humans is a punishment.

An objector will say that privacy is not a value to animals. While animals do not reflect on privacy, wild animal behavior shows that animals value the ability to avoid humans and other animals. Many animals conceal themselves in the wild to conduct their most intimate functions, such as nesting and giving birth, seeking as much privacy as conditions permit.²⁵⁷ Although concealment serves survival at those times the animal is most vulnerable, some animals display shyness as a temperamental characteristic.²⁵⁸ Other animals live mostly solitary lives, avoiding other animals except to reproduce.²⁵⁹ The traditional bias of animal science is to reject notions of individuality in favor of species and group norms.²⁶⁰ Researchers have begun to acknowledge that explanations of average animal behavior do not accurately de-

²⁵⁶ See *id.* at 511–12 (describing harmful physical and psychological effects on zoo animals); Michael Hutchins et al., *In Defense of Zoos and Aquariums: The Ethical Basis for Keeping Wild Animals in Captivity* (describing how captivity avoids pressures in the wild like starvation and predation), in *THE ANIMAL ETHICS READER*, *supra* note 38, at 513, 517.

²⁵⁷ See, e.g., Hugh Warwick, *Photographers—Don't Pap Our Wild Animals, They Need Some Privacy Too*, *GUARDIAN* (Nov. 10, 2015, 7:02 AM), <http://www.theguardian.com/commentisfree/2015/nov/10/wildlife-photographers-disturb-pictures> [<https://perma.cc/3AAJ-CKJ7>] (accessed Dec. 20, 2016) (discussing reduced mating of widely photographed deer in London).

²⁵⁸ See MARY K. ROTHBART & JENNIFER A. ALANSKY, UNIV. OF OR. DEP'T OF PSYCHOLOGY, TEMPERAMENT, BEHAVIORAL INHIBITION, AND SHYNESS IN CHILDHOOD 150–52 (1990), http://www.bowdoin.edu/~sputnam/rothbart-temperament-questionnaires/cv/publications/pdf/1990_Temperament_behav%20inhib_shyness_Rothbart-Mauro.pdf [<https://perma.cc/MA5P-SUZZ>] (accessed Dec. 20, 2016) (discussing relatively stable shyness traits similar to those of humans in rhesus monkeys and rodents).

²⁵⁹ MATHER ET AL., *supra* note 191, at 17.

²⁶⁰ MARC BEKOFF, *Individual Animals Count: Speciesism Doesn't Work*, *PSYCHOL. TODAY* (Aug. 24, 2009), <https://www.psychologytoday.com/blog/animal-emotions/200908/individual-animals-count-speciesism-doesnt-work> [<https://perma.cc/R6XB-QSBE>] (accessed Dec. 20, 2016).

scribe the rich differences among individuals within a species.²⁶¹ This individual identity is a core component of dignity that not only humans can claim. Groups do not possess dignity in their own right although membership in a group can be a core component of individual dignity that needs protection.

Even distant access to animals by air or hidden camera raises potential animal dignity issues, even if the animal is wholly unaware of the intrusion. Brett Mills has made this point about animal documentaries.²⁶² According to Mills, documentary producers and photographers usually have sound motives to educate and inspire the public to be conservationists, and they are extremely cautious about disturbing animal functions by their presence.²⁶³ Yet they do not stop to consider the threshold issue whether filming wild animals violates their interests in being alone and unobserved: “Underpinning such action is an assumption that animals have no right to privacy”²⁶⁴ The lost privacy of zoo animals compounds the losses of free agency. The invited public has open access to all animals except those who are ill or giving birth. The public may gawk and respond with visible and audible humor, fear, or curiosity, making the animals spectacles.

Frank Noelker’s haunting photographic study of zoos shows animal cages with painted wild backgrounds and animals in spaces that can never accommodate their needs.²⁶⁵ The photos without commentary demonstrate how captivity mocks animals’ wild nature, thus violating their dignity in outward presentation to the world. The visual reminders of life in the wild are a cruel testament to the dignity the animals have lost or never had.

Minimally, some animals should never be in zoos because both their welfare and dignity interests are impossible to respect. This includes large animals, like elephants, that travel long distances in their everyday lives and selectively associate with other elephants, often extended family in the case of females, and male individuals in the case of adolescent and older males once they leave their matriarchal groups.²⁶⁶ These relationships are demonstrably important to elephants, who grieve the deaths of cohorts in complex and persistent ways,²⁶⁷ and who remember their associates after lengthy lapses, even twenty years.²⁶⁸ People would readily glean the harm that humans would suffer from such coerced estrangement, but they are complicit in inflicting such injury on intelligent and emotionally complex ele-

²⁶¹ *Id.*

²⁶² Brett Mills, *Television Wildlife Documentaries and Animals’ Right to Privacy*, 24 CONTINUUM: J. MEDIA & CULTURAL STUD. 193, 195 (2010).

²⁶³ *Id.*

²⁶⁴ *Id.* at 196.

²⁶⁵ FRANK NOELKER, *CAPTIVE BEAUTY: ZOO PORTRAITS* (2006).

²⁶⁶ SAFINA, *supra* note 113, at 40.

²⁶⁷ *Id.* at 67–69, 73.

²⁶⁸ GRUEN, *supra* note 53, at 131.

phants. Reminding people of the great dignity of such creatures should contribute to the outcry against such captivity.

Large predators belong neither in zoos, nor in captivity. Predatory cats, for example, roam large territories for hunting and defense, and these simply cannot be replicated in even the best zoos. Their predatory nature presents special ethical problems that cannot be satisfactorily resolved. Either the animals are thwarted from exercising their predatory urges, and provided alternative ‘enrichment’ such as the balls on ropes that Martha Nussbaum described,²⁶⁹ or the zookeepers allow the predators to kill or at least consume the flesh of recently killed animals, which involves humans deliberately ending animal lives for the purpose of sustaining the zoo enterprise. The Copenhagen Zoo recently aroused public distress by “culling” its excess giraffes and feeding them publicly to a lion.²⁷⁰

C. Entertainment Facilities

Zoos are essentially entertainment facilities that invite the public for recreation and enjoyment, but well-designed zoos do not present the extreme threats to dignity of other animal entertainment enterprises. In circuses and shows, humans train the captive animals to perform stunts for human amusement. Susan Cataldi is one of the few authors who have analyzed in depth the undignified treatment of particular entertainment animals.²⁷¹ She describes a Russian circus bear dressed in women’s clothing and forced to stand upright and push a baby carriage.²⁷² The audience laughed at the bear’s ridiculous antics, further demeaning the animal to the point of “something sad, something bordering on the obscene.”²⁷³ Cataldi speculates on the training that the bear must endure and its welfare implications. Beyond animal suffering however,²⁷⁴ “portrayal of circus animals as substitute humans” violates their dignity interest in leading “biologically normal lives.”²⁷⁵ Central here is the animal’s ability to follow its preferences and to resist external forces.²⁷⁶ This idea of setting limits on others’ control of one’s activities may explain why instances of animal resistance in response to cruel human treatment appear to be expressions of righteous outrage and declarations of dignity.²⁷⁷

²⁶⁹ NUSSBAUM, *supra* note 13, at 370–71.

²⁷⁰ Dan Bilefsky, *Danish Zoo, Reviled in the Death of a Giraffe, Kills 4 Lions*, N.Y. TIMES (Mar. 26, 2014), <http://www.nytimes.com/2014/03/27/world/europe/lion-killing-at-danish-zoo-provokes-fresh-outrage.html> [https://perma.cc/P9X9-5WD2] (accessed Dec. 20, 2016).

²⁷¹ Susan Laba Cataldi, *Animals and the Concept of Dignity: Critical Reflections on a Circus Performance*, 7 ETHICS & ENV’T 104, 104–26 (2002).

²⁷² *Id.* at 106.

²⁷³ *Id.*

²⁷⁴ *Id.* at 106–07.

²⁷⁵ *Id.* at 113.

²⁷⁶ *Id.* at 114.

²⁷⁷ See, e.g., HRIBAL, *supra* note 100, at 44–45 (describing Janet the circus elephant who reached her “breaking point” and turned on specific employees).

Marine entertainment, circus shows, and rodeos move beyond coercive captivity into humiliation. Besides the cruelly aversive and often violent methods of animal training that people have reported,²⁷⁸ forcing animals to perform to please human audiences subjects the animals to ridicule in ways that violate the external components of dignity as presenting a worthy self to others.²⁷⁹ Humans recoil at overt humiliation of other humans, as in Abu Ghraib, but many do not respond similarly to animals forced to assume unnatural positions and perform whimsical acts. This is so even if the trainers and human actors value the animals and avoid cruelly hurting them. The difference in empathy is related to overlooking the dignitary interests of animals.

The recent CNN film *Blackfish* exposed SeaWorld's marine entertainment facilities as places that cannot accommodate the basic needs of orcas, the largest species of sea dolphin.²⁸⁰ Following diminished post-*Blackfish* ticket sales,²⁸¹ SeaWorld television advertisements emphasize how well marine animals fare in measurements like life span, and how much the humans who work with killer whales 'love' their animal charges and would not associate with a marine establishment that treated its animals poorly.²⁸² Affection and standards of training that avoid direct cruelty do not address the interests that large marine animals have in free agency, enduring social relations, and movement over large marine areas,²⁸³ all of which are components of dignity as related to an animal's ability to realize norms for a being of its kind. Research has not produced full understanding of the capacities and habits of marine mammals, but it has revealed enough information to conclude that these animals develop complex and enduring relationships with their kind.²⁸⁴ Orcas live in remarkably stable pods, which are social groups that may even have their own languages and culture.²⁸⁵ All dolphins communicate in sophisticated and subtle ways about their surroundings and emotional states.²⁸⁶ They have highly developed brains that prepare them for peaceful so-

²⁷⁸ See, e.g., WAISMAN ET AL., *supra* note 243, at 122–25, 136–37 (describing training for rodeos, animal racing, and elephants in entertainment and zoos).

²⁷⁹ See, e.g., ROSEN, *supra* note 3, at 30, 40 (describing dignity as an intrinsic value).

²⁸⁰ BLACKFISH, *supra* note 97.

²⁸¹ Michael Calia, *SeaWorld Attendance, Revenue Continue to Decline*, WALL STREET J. (Feb. 26, 2015, 8:07 AM), <http://www.wsj.com/articles/seaworld-attendance-revenue-continue-to-decline-1424956041> [https://perma.cc/KEK2-F3M2] (accessed Dec. 20, 2016).

²⁸² See SeaWorld Parks & Entertainment, *What Should You Know About SeaWorld's Killer Whales?*, YOUTUBE (Apr. 6, 2015), <https://www.youtube.com/watch?v=2fa6inwz-LIA> (accessed Dec. 20, 2016) (showing a cable television advertisement that aired over the summer of 2015).

²⁸³ See WHITE, *supra* note 18, at 76, 125–26 (describing attributes typical of large marine mammals like dolphins); *Killer Whale* (Orcinus orca), NOAA FISHERIES, <http://www.nmfs.noaa.gov/pr/species/mammals/whales/killer-whale.html> [https://perma.cc/52XE-8B34] (accessed Dec. 20, 2016).

²⁸⁴ See WHITE, *supra* note 18, at 126–35 (describing social relationships).

²⁸⁵ *Id.* at 141–44 (recognizing distinctive whistles of individuals).

²⁸⁶ *Id.* at 144–47.

cial interactions, altruistic behavior, and even dispute resolution that maintains group harmony.²⁸⁷ Animal individuals are compelled in captivity to belie their species inclinations and forego their most important pursuits.

Once thwarted, some of these animals display stereotypical behavior and pathological tendencies that researchers recognize as definite signs of trauma.²⁸⁸ Tilikum, the orca subject of *Blackfish*, provides a good example of animal pathology; he has killed several humans and now spends most of his time in isolation.²⁸⁹

How to handle such cases of captive marine mammals, should humans ever decide that this form of captivity lacks justification, is fraught with ethical quandaries. Some well-meaning animal friends advocate for ‘liberating’ the captives, without carefully considering whether the animals can function in the wild or return safely and effectively to their family and social groups.²⁹⁰ Well-designed sanctuaries in semi-wild water areas would be necessary to dignify the compromised animals, and these places would defer to species’ traits but mostly the condition and history of individual animals. Refuges will be very expensive, and the corporations and entertainment industries that use the animals should bear most of this cost because they have profited from animal victimization. In a transitional period of waning public interest in such dubious forms of entertainment, each admission fee should include a portion specifically devoted to animal rehabilitation and protection.

I do not have space here to discuss other entertainment venues, except to note the commitment of Ringling Brothers to eliminate elephants from its circus programs by 2018.²⁹¹ One hopes that Ringling will bolster this gesture with funds to develop sufficient sanctuaries and support for the former performers as a partial remedy for subjecting animals to human coercion and whimsy. The 1950s Disney movie,

²⁸⁷ *Id.* at 130–31, 139–41, 152–54.

²⁸⁸ NAOMI A. ROSE, HUMANE SOC’Y INT’L & HUMANE SOC’Y U.S., KILLER CONTROVERSY: WHY ORCAS SHOULD NO LONGER BE KEPT IN CAPTIVITY 3–8 (2011), http://www.hsi.org/assets/pdfs/orca_white_paper.pdf [<https://perma.cc/Y38V-YVM6>] (accessed Dec. 20, 2016) (listing ways in which whales and dolphins suffer in captivity, including infant mortality, disease, poor dental health, and abnormal aggression toward animals and humans).

²⁸⁹ See Colleen Gorman, *Seeing Is Believing: Tilikum’s Lonely Life After Dawn*, ORCA PROJECT (Sept. 3, 2010), <https://theorcaproject.wordpress.com/2010/09/03/seeing-is-believing-tilikums-lonely-life-after-dawn/> [<https://perma.cc/4W3T-KHCE>] (accessed Dec. 20, 2016) (describing a woman who claims to have observed Tilikum in isolation over many hours on multiple occasions since he killed his trainer).

²⁹⁰ ROSE, *supra* note 288, at 9–11. Shelley Ottenbrite, a student at Vermont Law School, is considering the best methods and facilities for handling creatures like Lolita who are no longer suitable for free release.

²⁹¹ Jason Bittel, *Ringling Bros. to Retire Its Circus Elephants*, NAT’L GEOGRAPHIC (Mar. 05, 2015), <http://news.nationalgeographic.com/news/2015/03/150305-ringling-bros-retires-asian-elephants-barnum-bailey/> [<https://perma.cc/A3FP-EVHZ>] (accessed Dec. 20, 2016) (reporting that Ringling Bros. and Barnum and Bailey will retire their traveling Asian elephants by 2018).

Dumbo, is a story of a young elephant with oversized ears who was a source of ridicule for humans and the other animals.²⁹² With the help of a companion crow, Dumbo learned to fly for the awe of rapt audiences, harnessing his exceptional anatomy.²⁹³ Instead of a story of release, however, Dumbo found salvation in finally pleasing human crowds, which some might argue was his way of finding his dignity.²⁹⁴ At least the Ringling commitment demonstrates evolving public distaste for entertainment forms of animal servitude, at least for animals with complex mental lives, interests, and a dignity that simply cannot be accommodated in captivity.

D. *Animals Captive for Conservation Purposes*

Government wildlife specialists sometimes capture animals listed as highly endangered, intending to breed the animals to save the species from extinction and preserve species' genetic integrity. A good example of this is the red wolf conservation project in the southwest.²⁹⁵ The numbers of *Canis rufus* were dwindling and their genetic composition becoming less distinctive from interbreeding with coyotes.²⁹⁶ At first, wildlife managers captured animals appearing to be red wolves and identified those that retained the most red wolf genetic information.²⁹⁷ They quickly released wolves that did not qualify, leaving a scant fourteen animals eligible for breeding.²⁹⁸ Eventually managers successfully bred the wolves in captivity and released some into the wild with hopes and some plausible success of reinvigorating the species.²⁹⁹

Did this effort violate the dignity of the captive animals? Decidedly, it did. It deprived the wolves of free movement and chosen social groupings in packs, rendered them completely dependent on humans to meet basic survival needs for food and shelter, and exposed them only to breeding opportunities with the individuals humans selected. All of these steps deprived wild animals of free agency and altered the animal networks that the captured social carnivores had formed, both of which are dimensions of individual identity.

Given this impact on the wolves' dignity, was the project justified? The significant dignity interests at stake placed a very high ethical burden of proof on the human participants to justify the plan despite the dignitary and welfare violations of animal individuals. This may be

²⁹² DUMBO (Walt Disney Productions 1941).

²⁹³ *Id.*

²⁹⁴ *See id.* (depicting Dumbo attaining popularity by entertaining humans).

²⁹⁵ U.S. FISH & WILDLIFE SERV., RED WOLF RECOVERY PROGRAM: 4TH QUARTER REPORT (2012), https://www.fws.gov/redwolf/Images/20121029_RedWolf_QtrReport_FY12-04.pdf [<https://perma.cc/M3CP-GKYB>] (accessed Dec. 20, 2016).

²⁹⁶ HAMPTON, *supra* note 94, at 171–72.

²⁹⁷ *See id.* at 179 (discussing the genetic qualifications sought when capturing red wolves).

²⁹⁸ *Id.*

²⁹⁹ *See id.* at 180–81 (describing early release of wolves born in captivity).

one of the rare cases where the holistic conservation perspective that emphasizes species and systems outweighs the affronts to the well being and dignity of particular animals.³⁰⁰ This is because the species *Canis rufus* was on the brink of demise and extraordinary measures were necessary to forestall extinction.³⁰¹ The foreseeability of species decline makes humans ethically responsible for preventing animal numbers from dwindling to the brink. Given a genuine emergency, however, it is probably justified to compromise individual animal dignity to ensure species continuation, provided the animals are treated well and eventually released to thrive on their own in the wild.

Relocations of captured animals for species preservation similarly impose a high burden of proof on wildlife decision makers and managers. The mid-'90s capture of gray wolves in Alberta, Canada, and their removal to Yellowstone Park inflicted surprising and well-documented stresses on the captives,³⁰² and no one ever assessed the impact on the wolves left behind with disrupted packs. Although the ecology of the park has since improved with the predators' presence,³⁰³ such removal projects should not be undertaken lightly. The project jeopardized the animals' welfare in trapping, sedating, collaring, transporting, and forcibly removing them from established social groupings and transplanting them into cages for a period of acclimation.³⁰⁴ It infringed the dignity of wild beings thrust into complete dependency on humans, thwarting animal agency at least temporarily. Wolves wary of humans were suddenly under their complete control.

Following release, the animals were continuously monitored and subject to re-intervention at any time.³⁰⁵ For example, the first pregnant wolf released into the park occupied a hastily-prepared and vulnerable den, and wildlife managers made the controversial decision to place her again in captivity for the birthing, leading Mike Phillips, manager of the Canadian removal, to say: "I'm starting to feel like a damned zookeeper."³⁰⁶ Although the wolf's welfare and that of her newborns was objectively better protected in captivity, her identity as a wild being was not. In the wild, pregnant wolves isolate themselves even from other wolves just before birth,³⁰⁷ and this wolf lost her dignity interest in fulfilling a most intimate function. In other words, the invasive aspects of wildlife reintroductions of complex animals demand strong justification for conservation purposes, and considering animal

³⁰⁰ Reed Elizabeth Loder, *Toward Reconciling Environmental and Animal Ethics: Northeast Wolf Reintroduction*, 10 J. ANIMAL & NAT. RESOURCE L. 95, 150–51 (2014) (defending red wolf captive breeding and release).

³⁰¹ *Canis Rufus*, IUCN RED LIST, <http://www.iucnredlist.org/details/3747/0> [https://perma.cc/TM7C-85QR] (accessed Dec. 20, 2016).

³⁰² Loder, *supra* note 300, at 107–11.

³⁰³ *See id.* at 151–53 (describing ecological successes in Yellowstone region).

³⁰⁴ *Id.* at 107–11.

³⁰⁵ *Id.* at 126–27.

³⁰⁶ *Id.* at 127.

³⁰⁷ *Id.*

welfare is not enough. An animal's dignity must also be taken into account.

E. *Hunting Ranches*

A more controversial form of captivity defended on conservation grounds occurs on large private hunting ranches, many in Texas, that contain internationally endangered animals that can no longer thrive in their indigenous habitat.³⁰⁸ Hunters pay large sums to track and kill these exotic animals, a portion of which is donated to conservation projects designed to forestall the extinction of the particular species, which include dama gazelles and scimitar horned oryx.³⁰⁹ Fees are based on the principle that the most rare animals are most expensive to hunt.³¹⁰ The owner ranchers plausibly argue that they are saving disappearing animals, which would not happen without economic incentives for them and recreational incentives for the hunters.³¹¹ Supporting this, the success rate of actually killing an animal is fairly low.³¹² Thus the animals conduct their lives with many opportunities for free agency and engagement in breeding and other species typical activities, thus ensuring a relatively dignified existence. The vast acreage involved distinguishes these ranch practices from many 'canned' hunts, with the animals fenced in relatively small surroundings, raised accustomed to humans, and thus without chance of survival.³¹³

The ethical concerns with commercial hunting practices on large ranches, with animals living relatively unmolested among their kind, center more on human virtue and character than animal dignity per se. Simply speaking, virtue ethics is the 'field' of moral philosophy that emphasizes character traits over actions.³¹⁴ Virtue theory has ancient antecedents,³¹⁵ but its modern revival in philosophy is at least partly a

³⁰⁸ See, e.g., Transcript of *Can Hunting Endangered Animals Save the Species?*, 60 MINUTES (Jan. 30, 2012), <http://www.cbsnews.com/news/can-hunting-endangered-animals-save-the-species/> [<https://perma.cc/A5GS-GJBX>] (accessed Dec. 20, 2016) (reporting on the more than 250,000 animals native to Asia, Africa, and Europe that live on ranches in Texas).

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ See, e.g., Patrick Barkham, "Canned Hunting": *The Lions Bred for Slaughter*, GUARDIAN (June 3, 2013), <http://www.theguardian.com/environment/2013/jun/03/canned-hunting-lions-bred-slaughter> [<https://perma.cc/R3ED-A8P2>] (accessed Dec. 20, 2016) (describing South African lion-hunting).

³¹⁴ See, e.g., ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 1–3, 108 (1999) (stating the need to address emotions, motives, and character in moral philosophy); CHRISTINE SWANTON, VIRTUE ETHICS: A PLURALISTIC VIEW 93 (2003) (describing virtue ethics as mixing approaches in philosophy that focus on consequences and duties); Michael Stocker, *The Schizophrenia of Modern Ethical Theories* (criticizing separation of reason and emotion), in VIRTUE ETHICS 66, 71 (Roger Crisp & Michael Slote eds., 1997).

³¹⁵ See, e.g., CONFUCIUS, THE ANALECTS 59, 72, 84, 100, 112, 116, 124, 137 (D.C. Lau trans., Penguin Books reprint. 1982) (relating Confucian lessons on traits like reverence, benevolence, and wisdom); ARISTOTLE, THE NICOMACHEAN ETHICS (Martin Ostwald

reaction to the predominant emphasis of traditional Western ethics on action and principles to guide conduct.³¹⁶ A virtue ethicist prefers to focus on character, defining desirable dispositions that humans should cultivate in pursuing a good life.³¹⁷ These vary specifically with particular theories but include traits like courage, benevolence, generosity, and humility.

A virtue approach has definite implications for animal dignity. The link is that arrogance and recklessness toward animals leads to disregarding them as dignified and worthy of respect for their special individual attributes and functioning as beings of their kind. This disregard also offends human dignity, which is partly based on moral capacities, because cruelty and indifference toward animals reflects deficiencies in valued ethical responses like empathy, sympathy, and compassion. Subjecting animals to hunting and killing for recreational purposes is an issue that environmental ethicists have debated, and I will not rehash here.³¹⁸ The concern for animal dignity is the spillover effect of human attitudes toward animals more generally, that can result in callousness and the sense that superior humans are entitled to subject animals to injury or death for pleasure.

F. Research Animals

Because these animals are fully captive, humans owe them a very high duty of care. Because the animals' welfare is overtly being sacrificed for human aims, even well intentioned aims like human health, the responsibilities are greater still. I will not discuss here the myriad physical and psychological harms levied on these hapless creatures but will concentrate on their dignity interests. Others have questioned the efficacy of medical research on animals, given their biological differences from humans.³¹⁹ Even the research industry has reached consensus on the longstanding three R's, committing to Refining procedures, Reducing the number of animals used, and Replacing animals with non-animals.³²⁰ Despite some restrictions in the U.S.

trans., The Bobbs-Merrill Co. 3d prtg. 1962) (presenting a comprehensive theory of virtue).

³¹⁶ See HURSTHOUSE, *supra* note 314, at 1–3, 108 (stating that modern ethical theories that focus on duties or rules lack consideration of virtues or moral character); Stocker, *supra* note 314, at 66, 71 (stating that modern ethical theories that focus on reason lack consideration of motives and motivational structure).

³¹⁷ See HURSTHOUSE, *supra* note 314, at 1–3, 108 (arguing for addressing emotions, motives, and character in moral philosophy).

³¹⁸ See, e.g., MARTI KHEEL, NATURE ETHICS: AN ECOFEMINIST PERSPECTIVE 90–93 (2008) (critiquing justifications for hunting as sport and responsible male character development); VARNER, *supra* note 162, at 118–20 (arguing for “presumption” against hunting except for control of over-populated prey species).

³¹⁹ See, e.g., C. RAY GREEK & JEAN SWINGLE GREEK, SACRED COWS AND GOLDEN GEESE: THE HUMAN COST OF EXPERIMENTS ON ANIMALS 18–20 (2000) (asserting that extrapolating from animals to humans is misleading and lacking in scientific value).

³²⁰ See, e.g., F. Barbara Orlans, *Ethical Themes of National Regulations Governing Animal Experiments: An International Perspective* (explaining the three R's that the

Animal Welfare Act (AWA) that protect some research animals from unnecessary mistreatment,³²¹ the Act excludes the vast majority of research animals, rodents, and birds from any protection.³²² The AWA does mandate that each covered facility set up an Institutional Animal Care and Use Committee (IACUC) to oversee animals that the Act protects.³²³ Largely insider IACUC groups oversee the standards of animal care,³²⁴ raising concerns about cultural capture of people who spend their days within the institutions they are overseeing. The practice of numbering, not naming, the animals enables their commodification and emotionally distances humans from the animals' terror and misery.³²⁵

The AWA gives attention to the "psychological well-being of primates."³²⁶ Litigation over the regulatory standards on enrichment failed to establish minimum requirements like social contact, noting differences among individual primates and their circumstances.³²⁷ Captive research primates are in different stages of compromise, and some might never have developed species-typical interests such as social contact with other primates. This raises questions about defining the dignity of damaged animals. Species-based norms may actually harm a creature raised under aberrant captive conditions and subjected to trauma and pain. The story of Lucy, the chimpanzee, illustrates this. Lucy lived in a house with a human family and learned sign language.³²⁸ When Lucy became hard to handle she was released into the wild on an island in the Gambia River, where she died shortly after the departure of Janis Carter, the human who patiently taught Lucy (and other primates) how to live as one of her kind.³²⁹

The National Institute of Health recently committed to ceasing research on great apes (chimpanzees, gorillas, and orangutans) and re-

animal research industry is committed to), in *THE ANIMAL ETHICS READER*, *supra* note 38, at 334–41.

³²¹ 7 U.S.C. §§ 2137, 2143 (2012); see *WAISMAN ET AL.*, *supra* note 243, at 475, 479–81 (describing the terms and evolution of the AWA).

³²² *WAISMAN ET AL.*, *supra* note 243, at 475, 480 (stating that birds, rats, and mice are estimated to represent 95%–99% of research animals).

³²³ *Id.* at 479.

³²⁴ See, e.g., Christian E. Newcomer, *General Composition of the IACUC and Specific Roles of the IACUC Members* (stating that each committee must have one veterinarian and one member outside of the organization), in *THE IACUC HANDBOOK* 37 (Jerald Silverman et al. eds., 2d ed. 2007).

³²⁵ MARC BEKOFF, *THE ANIMAL MANIFESTO* 109 (2010); see *BEKOFF*, *supra* note 83, at 248 (describing how naming a research animal can influence its treatment).

³²⁶ 7 U.S.C. § 2143(a)(2)(B).

³²⁷ *Animal Legal Def. Fund, Inc. v. Glickman*, 204 F.3d 229, 234–35 (D.C. Cir. 2000).

³²⁸ Douglas Foster, *35 Who Made a Difference: Janis Carter the Primate Who Taught Other Primates How to Survive in the Wild*, *SMITHSONIAN.COM* (Nov. 1, 2005), <http://www.smithsonianmag.com/science-nature/35-who-made-a-difference-janis-carter-112879602/> [<https://perma.cc/3X7W-XPFR>] (accessed Dec. 20, 2016).

³²⁹ *Id.*

leasing the primates to sanctuaries as available over time.³³⁰ Such facilities must be prepared to handle conditions at least analogous to post traumatic stress disorder in humans and must be flexible enough to respond to unique histories. Animal dignity in this context resembles the continuum of interests of disabled humans and requires a highly individualized approach. Undignified treatment in the past places a heavy obligation on the entity or persons who perpetrated the harm and that benefited from research, such as drug companies, to fund viable sanctuaries that will be costly.

Incremental progress for primates leaves the vast majority of research animals without any guarantee of minimal dignity. This violation goes beyond those who have deliberately inflicted serious physical and psychological harm on living beings. The dignity of the short and often miserable lives of research animals is everyone's concern. If humans tout their own dignity through moral capacities, disregarding the dignity of animals damages human dignity as well.

G. Farm Animals

Like their research counterparts, typical American farm animals have short and miserable lives devoid of dignity. Even an animal born to perish is entitled to be treated as a conscious being with emotions and interests, and the condition of animal lives on the farm is an index to the decency of every person who consumes meat and other animal products. Yet no other group of animals is so breathtakingly without legal and moral protection.³³¹ Farm animals are probably the 'biggest losers' when it comes to dignity.

Farm animals suffer extreme deprivations of autonomy in overall confinement, thwarting basic biological needs for movement and space.³³² Industrial agriculture includes horrific confinement in crowded feedlots, battery cages for hens, gestation crates for sows, veal crates, and other devices that severely restrict even the most basic physical freedom to turn around, lie down, or exercise.³³³ Such prac-

³³⁰ Sara Reardon, *NIH to Retire All Research Chimpanzees*, NATURE: INT'L WKLY. J. SCI. (Nov. 18, 2015), <http://www.nature.com/news/nih-to-retire-all-research-chimpanzees-1.18817> [<https://perma.cc/3H7F-Q7F8>] (accessed Dec. 20, 2016).

³³¹ See, e.g., Paige Tomaselli & Meredith Niles, *Changing the Law: The Road to Reform* (explaining that farm animal welfare regulation at the federal level is almost non-existent), in THE CAFO READER: THE TRAGEDY OF INDUSTRIAL ANIMAL FACTORIES 314, 317 (Daniel Imhoff ed., 2010).

³³² Bernard E. Rollin, *Farm Factories: The End of Animal Husbandry* (discussing the use of extreme space limitations of factory pigs as example of confinement farming), in THE CAFO READER: THE TRAGEDY OF INDUSTRIAL ANIMAL FACTORIES, *supra* note 331, at 6, 6–14.

³³³ See *id.* (describing the poor housing conditions of the majority of pigs bred for food); *Industrial Livestock Production*, GRACE COMM. FOUND., <http://www.sustainabletable.org/859/industrial-livestock-production> [<https://perma.cc/HV4Y-VBH6>] (accessed Dec. 20, 2016) (describing the living conditions of animals in industrial livestock production).

tices result in injuries, disease, and often death.³³⁴ Beyond extreme cruelty, these measures profoundly violate animal autonomy. This is so even if the animal has never known a different form of life, such as a pig who escaped the slaughter production line: “Yet even he, who has never known the warmth of the sun and the breeze and cool water, yearns for them. He liveth, yearning for the things of life.”³³⁵

Shocking to most people, American farm animals receive only minimal legal protection.³³⁶ I will not discuss at length particular laws governing the welfare of farm animals, except to say that federal protection comes only in transport to slaughter,³³⁷ and in the slaughter process that generally forbids killing animals not first rendered unconscious.³³⁸ To make matters worse, the laws do not require even minimal humane treatment of birds, because they are exempted from the federal legislation despite composing 95% of farm animals raised for food.³³⁹ Some state anti-cruelty laws do protect farm animals, including birds, from the most egregious forms of maltreatment and neglect, but only for offenses that far exceed industry norms that are not required to meet humane standards.³⁴⁰ Yet no anti-cruelty laws support even minimal dignity by affirmatively ensuring exposure to outdoors, sunlight, adequate space, exercise, and selected social relations.³⁴¹ Industrial farm animals lack freedom to behave as beings of their kind, let alone as distinctive individuals, and this thwarts the possibility of dignified, albeit short, lives. Welfare advocate for farm animals, Temple Grandin, has said: “We owe animals a decent life and a painless death.”³⁴² Most American farms do not come close to meeting even this meager guideline.

The powerful farming industry has exerted ongoing efforts to conceal these conditions from consumers of animal products through measures like ‘Ag-Gag Laws’ that prohibit employees from undercover

³³⁴ See, e.g., Rollin, *supra* note 332, at 11 (describing industrial agriculture practices that lead to injuries, disease, and death).

³³⁵ MATTHEW SCULLY, *DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY* 34 (2003).

³³⁶ See, e.g., WAISMAN ET AL., *supra* note 243, at 378 (describing complete lack of legislation protecting animals raised for food); Tomaselli & Niles, *supra* note 331, at 317 (explaining how factory farming has consistently evaded regulatory enforcement).

³³⁷ 49 U.S.C. § 80502 (1994); see WAISMAN ET AL., *supra* note 243, at 378, 443 (describing federal Twenty-Eight Hour Law that permits transport of animals for up to twenty-eight hours without food, water, or rest).

³³⁸ Humane Methods of Livestock Slaughter Act, 7 U.S.C. §§ 1901–1906 (1978); see Tomaselli & Niles, *supra* note 331, at 318 (describing federal and state laws regarding humane methods of livestock slaughter).

³³⁹ See Tomaselli & Niles, *supra* note 331, at 318 (describing the federal explicit exemption of chickens in the Humane Methods of Livestock Slaughter Act).

³⁴⁰ See *id.* (describing “common farming exemptions” (CFE)).

³⁴¹ See *id.* at 319 (describing a lack of regulations, enforcement, and prosecution in regards to animal welfare).

³⁴² Temple Grandin, *Thinking Like Animals*, in *THE ANIMAL ETHICS READER*, *supra* note 38, at 225, 227.

filming or reporting.³⁴³ Other common efforts include distancing slaughter facilities from public view,³⁴⁴ denigrating animal activists as “extremists” or even “terrorists,”³⁴⁵ and promulgating deliberately deceptive promotional campaigns about “happy cows” or chickens.³⁴⁶ The consumer is complicit in these deceptions. Many people do not consult accumulating and increasingly available information to educate themselves about the characteristics of farm animals and their treatment, perhaps because they prefer not to alter their consumptive habits.³⁴⁷ Employing an analogy to criminal law, this is a form of “conscious avoidance,” which does not relieve a person of culpability based on lack of knowledge.³⁴⁸ A sea change may be afoot, however, as more informed consumers selectively avoid commercial goods produced with cruel animal practices, even if they do not feel ready to commit to veganism or vegetarianism.³⁴⁹

Ethological information is transforming our notions of ‘just a cow’ or ‘just a chicken.’ I now consider some highlights of this research because of its relevance to understanding the dignity of these common farm animals. Domesticated cows evolved from large cattle ancestors in the wild.³⁵⁰ As prey beings, cows feel secure only in groups, or herds, where they can congregate and provide some protection for each other.³⁵¹ Cows are generally social animals that have physiological

³⁴³ See, e.g., Samantha Morgan, *Ag-Gag Challenged: The Likelihood of Success of Animal Legal Defense Fund v. Herbert First Amendment Claims*, 39 VT. L. REV. 241, 244–46 (2014) (discussing types of state legislation discouraging and punishing unconsented documentation of farm practices).

³⁴⁴ See Amy J. Fitzgerald, *A Social History of the Slaughterhouse: From Inception to Contemporary Implications*, 17 HUM. ECOLOGY REV. 58, 59–60 (2010) (tracing movement of slaughter facilities outside of cities and away from public view).

³⁴⁵ *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1200–01, 1210 (D. Idaho 2015), *appeal filed* *Animal Legal Def. Fund v. Wasden*, No. 15-35960 (9th Cir., Dec. 14, 2015) (quoting Idaho legislators’ comments about animal activists in legislative history of Interference with Agricultural Production bill).

³⁴⁶ See, e.g., WAISMAN ET AL., *supra* note 243, at 429–30 (discussing PETA false advertising lawsuit against California Milk Producers for advertising “happy cows” depicted grazing in pastoral scenes).

³⁴⁷ See, e.g., Rollin, *supra* note 76, at 139 (arguing that people believe moral issues involving animals are invisible because of pervasive animal use).

³⁴⁸ See *Willful Blindness*, NAT’L ASS’N CRIM. DEF. LAW, <https://www.nacdl.org/criminaldefense.aspx?id=21211> (accessed Dec. 20, 2016) (defining “conscious avoidance” as closing one’s eyes to highly probable facts).

³⁴⁹ See *Consumer Perceptions of Animal Welfare*, ANIMAL WELFARE INST., https://awi.online.org/sites/default/files/uploads/documents/fa-consumer_perceptionsoffarmwelfare_-112511.pdf [<https://perma.cc/QAD5-ENMK>] (accessed Dec. 20, 2016) (summarizing results of various polls conducted regarding consumers’ opinions on animal welfare).

³⁵⁰ April Holladay, *Cows Came from Aurochs 8,500 Years Ago*, USA TODAY (May 3, 2002, 3:37 PM), <http://usatoday30.usatoday.com/news/science/wonderquest/2002-05-01-cows.htm> [<https://perma.cc/DFL2-N2PX>] (accessed Dec. 20, 2016).

³⁵¹ Grandin, *supra* note 342, at 225–26; see also *Animal Behavior and Restraint: Cattle*, CTR. FOR FOOD SECURITY & PUB. HEALTH (2010), <http://www.cfsph.iastate.edu/Emergency-Response/Just-in-Time/08-Animal-Behavior-Restraint-Cattle-JIT-PPT-6slide-HANDOUT.pdf> [<https://perma.cc/228N-79H8>] (accessed Dec. 20, 2016) (describing cattle behavior).

needs to associate with others of their kind.³⁵² Cows do not tend to display distress, which helps to conceal fear from potential predators.³⁵³ Some people conclude incorrectly from cows' blank expressions that they are impassive creatures.³⁵⁴

Despite being herd animals, cows have distinct personalities, ranging from being affectionate with other cows and humans to standoffishness and aggressiveness.³⁵⁵ When permitted, cows regularly initiate play.³⁵⁶ Farmers who have lived among free ranging cows observe that cows have definite preferences about other cow companions,³⁵⁷ and also about such matters as where to graze and what to eat.³⁵⁸ This short description reveals a bit of the 'telos' of the cow, or the traits of the animal that fulfill its interests as a being of the kind.³⁵⁹

Mother cows are ordinarily very attached to their young, who stay under supervision in close proximity for many months if permitted.³⁶⁰ Predictably, the practice of removing few-day-old calves results in loud bellowing and other signs of extreme distress in mother and calf.³⁶¹ Dairy farms engage in this customary practice to make the mother's milk commercially available and hasten the time until she can be bred again.³⁶² Besides the overt cruelties inflicted on cows in confinement agriculture, the conditions also thwart the cow's opportunities to thrive according to its species' nature and individual personality, violating the animal's dignity almost completely, even apart from the animal's inevitable fate.

The fate of birds raised for poultry is a scandalous indignity. The 'telos' of the chicken is especially relevant to dignity because people know little about bird capacities. The law leaves birds unprotected, and, of all farm animals, these may suffer the worst fate. I will focus on hens in this Section and later consider broilers. Who are these crea-

³⁵² See ROSAMUND YOUNG, *THE SECRET LIFE OF COWS: ANIMAL SENTIENCE AT WORK* 3, 15, 25, 71–72 (2d. prtng. 2005) (describing stories of cows interacting with each other).

³⁵³ *Id.* at 2.

³⁵⁴ Hannah Velten, *The Emotional Depth of a Cow*, *GUARDIAN* (July 7, 2011, 1:59 AM), <http://www.theguardian.com/commentisfree/2011/jul/07/cows-best-friends> [https://perma.cc/6Q6L-8WX3] (accessed Dec. 20, 2016).

³⁵⁵ YOUNG, *supra* note 352, at 3, 8, 15, 26, 107.

³⁵⁶ *Id.* at 15.

³⁵⁷ *Id.* at 29, 54–55.

³⁵⁸ *Id.* at 10, 16, 68–69.

³⁵⁹ See Bernard E. Rollin, *The Ethical Imperative to Control Pain and Suffering in Farm Animals* (describing the term *telos* as “needs flowing from their nature”), in *THE ANIMAL ETHICS READER*, *supra* note 38, at 248, 253.

³⁶⁰ YOUNG, *supra* note 352, at 14–15, 33.

³⁶¹ See, e.g., *Cows for Dairy*, WOODSTOCK FARM SANCTUARY, <http://woodstocksanctuary.org/factory-farmed-animals/cows-for-dairy/> [https://perma.cc/X8XR-7G87] (accessed Dec. 20, 2016) (describing how mother cows search and call for their calves when separated). I am personally familiar with these painful and unforgettable sounds from an experience living slightly uphill from a dairy farm operated by farmers from Portugal.

³⁶² YOUNG, *supra* note 352, at 12–14.

tures? Recent research reveals that chickens are intelligent animals who form attachments to other chickens and can recognize as many as 100 individuals.³⁶³ They vocalize in numerous ways, including communicating their emotions, warning others of danger, calling other animals, and displaying affection.³⁶⁴ Chickens peck the soil for food and frequently bathe in dust to cleanse themselves of parasites and to freshen their feathers.³⁶⁵ They develop hierarchical ‘pecking orders’ that maintain group harmony.³⁶⁶ As complex animals, they require space and social opportunities to fulfill their nature, which are denied completely to them in industrial farming. Their rapid demise does not justify total deprivation.

Information about customary methods of raising hens for meat and eggs is available. Hens are packed into small wire (‘battery’) cages stacked on top of each other, giving them no possibility of stretching their wings or turning around.³⁶⁷ To combat injuries from the birds’ natural urge to peck, particularly in crowded conditions, farm personnel partially amputate birds’ beaks with hot electrical knives, causing extreme and chronic pain to a nerve-rich area of their anatomy.³⁶⁸ Even death is no solace because the birds have no legal protection in transport to the abattoir,³⁶⁹ and they are not covered under the federal Humane Methods of Slaughter Act.³⁷⁰ Consequently, birds surviving cultivation often perish on the way to slaughter or suffer gruesome death by scalding because assembly line throat-cutting moves too fast to achieve efficient death before immersion into vats of boiling water for feather loosening.³⁷¹ The condition of these animals is so deficient that even minimally honoring their dignity would transform bird agriculture.

³⁶³ Robert Grillo, *Chicken Behavior: An Overview of Recent Science*, FREE FROM HARM (Feb. 7, 2014), <http://freefromharm.org/chicken-behavior-an-overview-of-recent-science/> [https://perma.cc/26HL-5EBT (accessed Dec. 20, 2016)].

³⁶⁴ See *id.* (explaining that chickens have more than thirty different vocalizations).

³⁶⁵ HENG-WEI CHENG, USDA-ARS-MWA LIVESTOCK BEHAVIOR RESEARCH UNIT, CURRENT DEVELOPMENTS IN BEAK-TRIMMING 1 (2010), <http://www.ars.usda.gov/SP2UserFiles/Place/50201500/Beak%20Trimming%20Fact%20Sheet.pdf> [https://perma.cc/493T-A8TL] (accessed Dec. 20, 2016).

³⁶⁶ Grillo, *supra* note 363.

³⁶⁷ *Duhaime’s Law Dictionary: Battery Cages Definition*, DUHAIME.ORG, <http://www.duhaime.org/LegalDictionary/B/BatteryCages.aspx> [https://perma.cc/6HGM-374W] (accessed Dec. 20, 2016) (defining and describing battery cages and their widespread use).

³⁶⁸ CHENG, *supra* note 365, at 1 (describing de-beaking purposes and methods); Robert Streiffer & John Basl, *Ethical Issues in the Application of Biotechnology to Animals in Agriculture* (describing pain receptors in beaks and pain experienced in de-beaking), in *THE OXFORD HANDBOOK OF ANIMAL ETHICS* 826, 837 (Tom L. Beauchamp & R. G. Frey eds. 2011).

³⁶⁹ See WAISMAN ET AL., *supra* note 243, at 378 (explaining that the Twenty-Eight Hour Law on animal transport exempts birds).

³⁷⁰ See Tomaselli & Niles, *supra* note 331, at 318 (explaining that chickens are exempt from the Humane Slaughter Act).

³⁷¹ See, e.g., PETER SINGER & JIM MASON, *THE ETHICS OF WHAT WE EAT: WHY OUR FOOD CHOICES MATTER* 25–26 (2006) (describing the inadequacy of current throat-cutting techniques).

Pigs are among the most intelligent farm animals.³⁷² They evolved from wild boars and retain some characteristics of their wild ancestors.³⁷³ Pigs are social creatures who form strong bonds and recognize many individuals.³⁷⁴ When left to their own devices, they travel daily to forage and find nest sites.³⁷⁵ Given their high intelligence and complex emotions, pigs suffer from trauma and boredom, which alter normal behavior, sometimes making them aggressive.³⁷⁶ Pregnant pigs left alone devote considerable time and energy to selecting and building nests, sometimes far from their social group.³⁷⁷ Sows care for their young at first in isolation, and then in sounders, or small groups of three to six sows with their young, who all share in rearing.³⁷⁸ Pigs vocalize in many ways to communicate, including emotional expressions ‘sung’ to young suckling pigs, who recognize their mother’s distinctive vocalizations.³⁷⁹

Because pigs can bite each other’s tails in crowded situations, factory farmers sometimes ‘dock,’ or amputate, pigs’ tails—a painful procedure performed without anesthesia.³⁸⁰ Industrial farming practices include gestation crates that prevent a pregnant sow from turning around or standing up,³⁸¹ something unimaginably horrible to anyone who has been pregnant. As birth draws nigh, sows are moved to farrowing crates, which also restrict movement and enclose the mother by metal bars on concrete.³⁸² Industrial farmers wean the youngsters

³⁷² Anna Vallery, *5 Farm Animals That Are Probably Smarter Than Your Dog*, ONE GREEN PLANET (Jan. 30, 2015), <http://www.onegreenplanet.org/animalsandnature/farm-animals-that-are-probably-smarter-than-your-dog/> [<https://perma.cc/TXR8-73W4>] (accessed Dec. 20, 2016).

³⁷³ See JEFFREY MOUSSAIEFF MASSON, *THE PIG WHO SANG TO THE MOON: THE EMOTIONAL WORLD OF FARM ANIMALS* 36 (2003) (chronicling the pig’s evolutionary history).

³⁷⁴ See *id.* at 20, 26, 28 (describing pigs’ need to engage in complex tasks).

³⁷⁵ *More About Pigs*, HUMANE SOC’Y U.S. (Nov. 2, 2009), http://www.humanesociety.org/animals/pigs/pigs_more.html [<https://perma.cc/MP83-7KLLK>] (accessed Dec. 20, 2016).

³⁷⁶ See *id.* (explaining pig intelligence and tendency toward aggression when confined); *Enrichment Activities for a Bored Pig*, AM. MINI PIG ASS’N, <http://americanminipigassociation.com/mini-pig-education/training-your-mini-pig/enrichment-activities-bored-pig/> [<https://perma.cc/U8NP-YWZ9>] (accessed Dec. 20, 2016) (“Keeping a pig contained to a crate or alone in a room all day with no companionship or stimulation is sure to create a bored, agitated, destructive, and possibly aggressive pig.”).

³⁷⁷ HUMANE SOC’Y U.S., *supra* note 375.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ AM. VETERINARY MED. ASS’N, *LITERATURE REVIEW ON THE WELFARE IMPLICATIONS OF TEETH CLIPPING, TAIL DOCKING AND PERMANENT IDENTIFICATION OF PIGLETS* 2–4 (2014), https://www.avma.org/KB/Resources/LiteratureReviews/Documents/practices_piglets_bgnd.pdf [<https://perma.cc/9FWP-X53Q>] (accessed Dec. 20, 2016) (recommending against routine tail docking and favoring improved environmental conditions to address underlying causes). See also *N.J. Soc’y for the Prevention of Cruelty to Animals v. N.J. Dep’t of Agric.*, 955 A.2d 886, 909 (N.J. 2008) (finding the scientific reasons on the record in support of cattle tail docking to be inconclusive).

³⁸¹ Rollin, *supra* note 332, at 6–7.

³⁸² MASSON, *supra* note 373, at 39.

from their mother after birth much sooner than would occur in semi-natural circumstances, increasing stress in the animals.³⁸³ This hastens the time for the sow's re-breeding, and she winds up spending most of her life of three years until slaughter in conditions of isolation and extreme confinement.³⁸⁴

These measures manifestly violate the dignity of beings who normally display great affection for other animals through vocalizing, playing, nursing, and organizing into social groups. Modern farming practices thwart behavior that comes naturally and stifle the development of physical and emotional lives that pigs pursue unimpeded. Besides the obvious cruelty of these conditions, this social animal is forced to develop unnatural aggression toward its kind through complete deprivation of movement and social bonding.³⁸⁵ The outward presentation of the pig is of a passive, dirty, unsocial, and stupid being, completely out of accord with its real potential. Factory farming conditions reflect complete disregard for the animal's comfort, agency, and self-direction. Apart from overall moral questions about their use for food, these farm subjects should be guaranteed lives of dignified decency.

H. *Transforming Capacities: Animals and Biotechnology*

I earlier addressed the uses of animals for medical and other research. Here I will focus on the genetic modification of animals for human purposes. The motives of the humans engaged in this research matter morally, but good intentions do not relieve the human actors from moral doubts and a heavy burden of justification.

Take the most arguably commendable motivation of using animal biotechnology—to relieve human suffering. Animals can be sources of replacement organs and body parts for humans, provided the problem of rejecting foreign cellular material can be overcome.³⁸⁶ Genetically modified pigs, the farm animals previously discussed, are the best existing candidates for xenotransplantation. They can be created without pig proteins or other material causing immunosuppression in humans, and with the addition of human genetic material making transplant

³⁸³ ANNA K. JOHNSON ET AL., HOW DOES WEANING AGE AFFECT THE WELFARE OF THE NURSERY PIG? 1 (2012), <http://porkgateway.org/wp-content/uploads/2015/07/how-does-weaning-age-affect-welfare1.pdf> [<https://perma.cc/TW4V-ERJ5>] (accessed Dec. 20, 2016) (explaining semi-wild weaning from twelve to seventeen weeks and North American commercial weaning range from twenty-one to as low as seven days).

³⁸⁴ *Farm Animal Welfare: Pigs*, MSPCA-ANGELL, https://www.mspca.org/animal_protection/farm-animal-welfare-pigs/ [<https://perma.cc/4Y48-NMUU>] (accessed Dec. 20, 2016).

³⁸⁵ HUMANE SOC'Y U.S., *supra* note 375.

³⁸⁶ See, e.g., Aseda Tena, *Xenotransplantation: Can Pigs Save Human Lives?*, Sci. News: HARV. U. GRADUATE SCH. ARTS & SCI. (Nov. 2, 2015), <http://sitn.hms.harvard.edu/flash/2015/xenotransplantation-can-pigs-save-human-lives/> [<https://perma.cc/8BG6-MZA5>] (accessed Dec. 20, 2016) (assessing the possibility of xenotransplantation).

acceptance more likely.³⁸⁷ Yet the animals have supplied chemically treated heart valves for humans for decades.³⁸⁸ No matter how well intentioned, animals used to harvest organs for human medicine are in a condition of bodily servitude to humans. Converting living creatures into organ harvesting banks denies their agency and dignity of their lives because they lack the capacity to consent to altruism for the sake of another species. Because of the serious ethical questions surrounding the coercive use of any living creatures, synthetic and technological alternatives should be found as quickly as possible for the medical practice of animal organ harvesting. Yet, advances in gene-editing promise to take science in the opposite direction.

Biotechnology also challenges a trait-based view of dignity in replicating animal lives through cloning. The practice so far presents serious ethical concerns about the health of the cloned being and its progeny, including issues like rapid aging, oversized young, and genetic deformities, often in farm animals lacking any significant legal protection.³⁸⁹ The very notion of duplicating identities is a prospect that humans so fear that states have widely limited human cloning, and federal law effectively prohibits funding for biomedical research on cloning.³⁹⁰ The dignity of human individuals is a rationale for strong prohibition independent of welfare, in the interests of personal integrity and autonomy. This Article has defended a similarly relevant dignity of animal individuals. No stark separation is justifiable between nonhumans and humans on most specific grounds of dignity, including identity and integrity, consciousness and thinking, emotional complexities, agency, and even, at least in part, moral capacities. As these features differ in animals, so they diverge in humans according to varying capacities and interests. This continuity legitimizes the worry that animal cloning will slide into human cloning on a slippery slope.

A biotechnology topic especially important to dignity is that of splicing genes from an animal of one species and implanting them in another to achieve various human purposes. The resulting transgenic beings are therefore combinations of two or more species. Although many people feel spontaneous repugnance toward transgenic research, the ethical problems are hard to pin down. One concern is that human genes spliced into another species may result in human-animal hybrids, violating the integrity of *Homo sapiens* and raising novel ethical

³⁸⁷ *Id.*

³⁸⁸ *A History of Xenotransplantation Experiments*, PBS: FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/organfarm/etc/cron.html> [<https://perma.cc/VQ8M-5MHX>] (accessed Dec. 20, 2016).

³⁸⁹ BRUCE A. WAGMAN ET AL., *ANIMAL LAW: CASES AND MATERIALS* 548–49 (4th ed. 2010).

³⁹⁰ *State Laws on Human Cloning*, NEW ATLANTIS: J. TECH. & SCI. 95, 95–106 app. (2015), http://www.thenewatlantis.com/docLib/20150825_TNA46Appendix.pdf [<https://perma.cc/ZU56-CCWJ>] (accessed Dec. 20, 2016).

questions about the treatment of partial humans.³⁹¹ Will traditional human ethical restrictions apply, forbidding harmful uses of these beings and protecting their legal rights? Will a new legal regime be required to define such rights and implement their enforcement? People do not invoke similar cautions about creating transgenic animals with the genes of other animals because they endow humans with distinctive moral status, or dignity. On the broader view of dignity presented here, cautions should apply across species.

Bernard Rollin, a well-known advocate for sentient farm animals imagines the example of a chicken relieved of the nesting urge.³⁹² Rollin argues that this genetic manipulation would be morally acceptable because it would reduce the suffering of chickens forced to lay eggs in battery cages.³⁹³ Although Rollin concedes that it would be better to correct the underlying conditions in farming than to alter animal telos to fit the industrial model, he maintains that the changed animal experiences improved welfare.³⁹⁴ Others have considered an extension of the welfare principle to imagine an engineered chicken as “a deaf, blind, featherless, legless, anencephalic lump.”³⁹⁵ The resulting being would amount to an insentient blob that could be tapped for human food.³⁹⁶

Although it is undeniably urgent to reduce bird pain and suffering on industrial farms, ethical concerns with genetic alterations surpass welfare. Ethical outrage haunts the now infamous mid-century psychosurgery called, in America, lobotomies, that “took something from each of its patients, even if it was difficult to describe exactly what that ‘something’ was.”³⁹⁷ Tampering with human sentience and the characteristics that compose unique consciousness and personality breaches intuitive moral boundaries, even if it improves the experiences and functioning of the individual. This is because we value the dignity and integrity of the person as distinctive and deserving special protection, whereas we do not view nonhuman animals as sharing in these attributes. Rather, we tend to view sentience, or the capacity to experience pain and pleasure, as a narrower ethical basis for animal welfare.³⁹⁸

³⁹¹ See, e.g., David Degrazia, *Human-Animal Chimeras: Human Dignity, Moral Status, and Species Prejudice*, 38 METAPHILOSOPHY 309, 310–11, 313, 323 (2007) (noting transgenic science’s effect of causing moral confusion by altering humans and commending a continuum approach to moral status).

³⁹² Bernard Rollin, *Telos and Genetic Engineering*, in THE ANIMAL ETHICS READER, *supra* note 38, at 407, 411.

³⁹³ *Id.*

³⁹⁴ *Id.* at 413.

³⁹⁵ Stephen R.I. Clark, *Making up Animals: The View from Science Fiction*, in ANIMAL BIOTECHNOLOGY AND ETHICS 209, 217 (Alan Holland & Andrew Johnson eds., 1998).

³⁹⁶ *Id.*

³⁹⁷ Jenell Johnson, *A Dark History: Memories of Lobotomy in the New Era of Psychosurgery*, 1 MED. STUD. 367, 368 (2009).

³⁹⁸ See, e.g., Singer, *supra* note 38, at 37 (asserting that the capacity for suffering is the only appropriate boundary by which to sort animals).

The imaginary chicken lump is helpful in understanding the importance of animal dignity as a set of interests not reducible to pain and even long-term suffering. As beings with varying potential for agency that behave purposefully, pursuing some activities and shunning other possibilities, birds (and animals generally) possess dignitary interests resembling humans, despite significant species and individual differences. Altering the essence of an animal like a chicken to produce a being without sentience, consciousness, or purpose violates the identity and integrity aspects of dignity. The transgenic modification eradicates the species' 'telos' and individual integrity, in altering specific traits. Converting a formerly living, purposive creature into a senseless blob, however, obliterates its generic animality as a being capable of agency and direction—its dignity.

Here again, virtue ethics provides additional strong reasons why this human endeavor would be wrong. Animal dignity explains why human excesses (vices) disrespect animals, and a virtue approach condemns losses to the dignity of both the animal subjects and human actors. Environmental ethicists have long criticized the 'anthropocentric' attitude permitting humans to manipulate everything in nature to suit their own purposes,³⁹⁹ even those ethicists who do not explicitly espouse a virtue-based theory. The importance of traits like humility, self-restraint, and gratitude are the subject of much ethics literature on the environment,⁴⁰⁰ as is the impact of vices like arrogance on environmental crises.⁴⁰¹ Altering the core features of living beings for human purposes falls squarely within a virtue critique.

The usual response to ethical criticism of transgenic research is that humans have long engaged in genetic manipulations of animals, selectively producing over time animals with traits more desirable to

³⁹⁹ See ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 207, 209 (2d. prt. 1968) (calling for an evolution in attitude toward "ecological conscience"); Philip Cafaro, *Thoreau, Leopold, and Carson: Toward an Environmental Virtue Ethics* (analyzing famous environmental writings as implicitly virtue-oriented), in *ENVIRONMENTAL VIRTUE ETHICS* 31, 32, 44 (Ronald Sandler & Philip Cafaro eds., 2005); Tom Regan, *The Radical Egalitarian Case for Animal Rights* (asserting that anthropocentrism is the fundamental wrong in our attitude towards animals), in *ENVIRONMENTAL ETHICS: READINGS IN THEORY AND APPLICATION*, *supra* note 119, at 82, 83; Paul Taylor, *supra* note 119, at 142–44 (advocating the adoption of a biocentric respect for nature); Lynn White, Jr., *The Historical Roots of Our Ecological Crisis*, 155 *SCIENCE* 1203, 1203–04 (1967) (exploring the history of human modification of the land).

⁴⁰⁰ See, e.g., Thomas E. Hill, Jr., *Ideals of Human Excellence and Preserving Natural Environments* ("[W]illingness to [destroy the natural environment] may well reveal the absence of traits which are a natural basis for a proper humility, self-acceptance, gratitude and appreciation of the good in others."), in *ENVIRONMENTAL ETHICS: READINGS IN THEORY AND APPLICATION*, *supra* note 119, at 36, 36.

⁴⁰¹ See, e.g., Holmes Rolston, III, *Naturalizing Values: Organisms and Species* (explaining that it is astoundingly arrogant to believe that before human beings began making biological discoveries there was nothing of value in biological events), in *ENVIRONMENTAL ETHICS: READINGS IN THEORY AND APPLICATION*, *supra* note 119, at 105, 115.

humans.⁴⁰² The objector typically concludes that transgenic animals are merely different in degree rather than kind from their selectively bred counterparts. This response misses several ethical points. On the harm side of ethics, the side effects of transgenic research are harder to contain because of horizontal gene transfer that can change the characteristics of organisms in unforeseeable ways.⁴⁰³ Selectively breeding animals to possess selected traits takes place gradually, with incremental changes to the animals and opportunities to modify features adaptively to address unforeseen problems.⁴⁰⁴ Despite cautions about unmanageable harms, and there probably are more, the main reason why this research is so wrong is the violation of animal dignity.

Another example of transgenic research that would transform an animal without turning it into Rollin's non-conscious hypothetical 'blob' would involve splicing the genes of a centipede into a male chicken raised as a 'broiler.'⁴⁰⁵ Interestingly, my students in Animal Law and Ethics respond unanimously and spontaneously as soon as I mention this possibility: They groan in unison! Of course, people can be unreflectively biased, and groups of people can share unexamined cultural attitudes, especially when confronted with novelties, but a unified intuitive response signals the need for ethical examination.

The students' response does not express animal welfare concerns because the 'broiler' centipede-bird would actually suffer less. To make this point it is necessary to understand that the fate of male birds on the factory farm is no less horrific than that of their sister hens. The 'broilers' spend their short lives in unclean and dark longhouses with ammonia-saturated air and are so crowded that they must push others to move.⁴⁰⁶ The birds receive antimicrobial treatment to reduce bacteria and enhance size rapidly,⁴⁰⁷ producing more meat from fewer

⁴⁰² See, e.g., Kevin R. Smith, *Animal Genetic Manipulation: A Utilitarian Response* (arguing that "genetic manipulation" differs from "genetic selection" mostly in the speed of the process), in *THE ANIMAL ETHICS READER*, *supra* note 38, at 390, 393.

⁴⁰³ See Dhan Prakash et al., *Risks and Precautions of Genetically Modified Organisms*, INT'L SCHOLARLY RES. NOTICES (Sept. 18, 2011), <http://www.hindawi.com/journals/isrn/2011/369573/> [<https://perma.cc/3MLL-E4YD>] (accessed Dec. 20, 2016) ("[Horizontal gene transfer] may transfer the introduced genes from a GMO to potential pests or pathogens . . . [which] may alter the ecological . . . potential of the recipient organism and even bring about unexpected changes in structure or function.").

⁴⁰⁴ See JOHN E. SMITH, *BIOTECHNOLOGY* 5, 195 (4th ed. 2004) ("Selective breeding is a painfully slow process . . . [modifying] . . . animals through progressive selection for desired traits.").

⁴⁰⁵ See Chad West, *Economics and Ethics in the Genetic Engineering of Animals*, 19 HARV. J.L. & TECH. 414, 427–28 (2006) ("[C]hickens might be engineered with genes from centipedes, giving the birds more than two legs . . . or the chicken may be further modified into a kind of tube . . .").

⁴⁰⁶ See, e.g., Stuart Rachels, *Vegetarianism* ("[B]roilers'—are raised in windowless sheds . . . [where] the chickens cannot move around without pushing through other birds . . . [and] the sheds reek of ammonia."), in *THE OXFORD HANDBOOK OF ANIMAL ETHICS*, *supra* note 368, at 877, 879.

⁴⁰⁷ See D.J. Hampson & A.I. Murdoch, *Growth Enhancement in Broiler Chickens Receiving CHEMEQ^{RTM} Polymeric Antimicrobial*, 36 AVIAN PATHOLOGY 605, 605 (2003)

‘units.’ The legs that the birds have evolved biologically, however, cannot support the extra weight, causing painful conditions and immobility.⁴⁰⁸ Crowded and top-heavy birds cannot maintain balance.⁴⁰⁹ The centipede-broiler’s welfare could improve with extra appendages to support its designedly distorted body. Having extra legs could make the short six- to eight-week lives of male birds at least more tolerable. Reducing the suffering of the animal would also serve the farmer, who could now reap higher profits from more heavy birds surviving until slaughter. A bonus would be extra drumsticks for sale!⁴¹⁰

A core problem with the ingenious transgenic centipede-bird is that its human inventors have completely disregarded the integrity of the animal itself, a dimension of its dignity not synonymous with its welfare. Here, humans have devised a new being to serve commercial and food interests without modifying the underlying methods of farming that deprive animals of basic freedom of movement, association, and purpose. Now they have altered the evolutionary course of the species as well as the short-term physiology of animal individuals. Instead of revising the unethical conditions of servitude that lead inexorably to animal indignity on the modern farm, humans have modified the living creature itself.

I think this also violates the animal as a member of a species and thus harms others of its kind. This is not a commitment to collective dignity in that species themselves have dignity. Rather, changing the biological nature of an animal violates its species identity, which is a violation to the individual but which also affects the group to which the individual belongs.⁴¹¹ Not only does the animal lose its normal capacities to live its life as a being of its kind, but the future of other members of its species is also threatened genetically.

Although I have mostly considered animal dignity in the United States, it is relevant to consider some international legal sources that better address animal dignity. The Swiss apply dignity directly to biotechnology. Indeed, the Federal Constitution of Switzerland specifies:

The Confederation shall legislate on the use of reproductive and genetic material from animals, plants and other organisms. In doing so, it shall take account of the dignity of living beings as well as the safety of human

(“For over fifty years, antibiotics have been administered to poultry to promote feed efficiency and improve rates of weight gain.”).

⁴⁰⁸ See West, *supra* note 405, at 427 (“The modern bird has been bred to grow at twice its normal rate. Its legs can no longer carry its massive body weight, and the animal suffers leg pain and deformities as well as an enormous strain on its heart and lungs . . .”).

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 428.

⁴¹¹ See Christian Neuhäuser, *Humiliation: The Collective Dimension* (grounding human group rights in individualism but recognizing social threats to human groups that violate member dignity), in *VIOLATED*, *supra* note 7, at 21, 32.

beings, animals and the environment, and shall protect the genetic diversity of animal and plant species.⁴¹²

In compliance with the Constitutional directive, Switzerland enacted the 2008 Animal Protection Act, stating the policy of the law is “to protect the dignity and welfare of animals.”⁴¹³ The Act defined “dignity” as:

The inherent value of the animal, which is to be respected by anyone who handles it; the dignity of animals is not duly respected if they are subjected to stress which cannot be justified by overriding interests; stress involves in particular the infliction of pain, suffering or harm on animals, frightening or degrading them, profoundly altering their appearance or capacities, or unduly instrumentalizing them.⁴¹⁴

The Ethics Committee for Animal Experimentation of the Swiss Academies of Arts and Sciences clarified the meaning and implications of dignity in these legal documents, deciding that dignity is not a separate interest to be evaluated and that researchers respect dignity when they assess the full array of an animal’s interests, taking into account the stresses enumerated in the legislation: pain, suffering, harm, anxiety, altered appearance or capacities, degradation, and being treated merely as an instrument.⁴¹⁵ This clarification does not provide a comprehensive idea of dignity since it does not address varying animal interests beyond the negatively enumerated stresses. Also, the animal protection laws contemplate interests that may “override” those of an animal,⁴¹⁶ but the Committee did not attempt to identify what might count as an interest “overriding” dignity. Despite lingering issues, moving dignity to the forefront of Swiss legal analysis of biotechnology is a huge advance.⁴¹⁷ The direct legal recognition of animal dignity is a precedent that other countries should consider in addition to traditional animal welfare concerns. Especially in the biotechnology context, the idea of animal dignity best captures the ethical concerns with using genetics to alter features of animals and species.

⁴¹² BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 120, para. 2 (Switz.), <https://www.admin.ch/opc/en/classified-compilation/19995395/index.html#a120> [<https://perma.cc/QUG4-UPTJ>] (accessed Dec. 20, 2016).

⁴¹³ ETHICS COMM. FOR ANIMAL EXPERIMENTATION OF THE SWISS ACAD. OF ARTS AND SCI., THE DIGNITY OF ANIMALS AND THE EVALUATION OF INTERESTS IN THE SWISS ANIMAL PROTECTION ACT 2 (2010).

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 3.

⁴¹⁶ *Id.* at 5.

⁴¹⁷ For instance, in 2002, the lower house of parliament adopted a bill to amend the German Constitution (Basic Law) to include animals in a clause requiring the protection of dignity. *Germany to Grant Animal Rights*, BBC NEWS (May 17, 2002, 4:06 PM), <http://news.bbc.co.uk/2/hi/europe/1993941.stm> [<https://perma.cc/WXS3-67NE>] (accessed Dec. 20, 2016).

VII. CONCLUSION

The dignity idea should be elevated to central concern in animal law and ethics, much as it has for humans in post-World War II norms and jurisprudence. Animal ‘personhood’ is too constraining because of its longstanding association with humans and the many genuine differences among species and individuals who compose species. Personhood is also unlikely ever to protect non-mammalian creatures like birds who do not resemble humans and carry on alien lives, despite their demonstrated complexities as intelligent and emotional beings.⁴¹⁸ People relate to primates and other, similar warm-blooded beings because of their resemblance to us. Even those beings are relegated to inferiority and secondhand personhood, however, because they are assessed according to human norms of intelligence and values. Discussion should shift from personhood to dignity in its particular dimensions. The latter idea more neutrally and flexibly captures the enormous variety of individual traits that compose the identities and integrity of animals.

A dignity analysis is inevitably incomplete to the extent that it relies on species traits and capacities, including well documented physical, mental, and even moral complexities. While these characteristics are highly relevant, they are linked to the normal functioning of species, some of which is unknown or little understood. They also have limited utility for animals whose functioning is distorted in compromised lives, or exceptional individuals who have burst their species’ bounds. Dignity standing alone can never resolve all situational conflicts between humans and animals and among animals themselves. The concept does not function that way in animal ethics and law any more than it does in human rights. The inherently elastic quality of the idea makes precision an unrealistic expectation. Yet, the idea has definite strands of meaning. Minimally, it is a reminder that the interests of dignified beings count and must be considered in any ethical and legal regime. Dignity also has significance in defining negative rights in that its affronts are more recognizable than its affirmative requirements. We know that the centipede-chicken is a violation of animal dignity—hence the unified groan. We can understand that a veal calf or sow has more at stake than the pain and stress of grossly compromised movement. Despite the fuzzy edges of dignity in defining positive responsibilities, the idea is important in recognizing the deficient ethics of much human treatment of animals.

It is harder to glean whether the aerial filming of a secretive deep-sea creature damages the privacy aspects of its dignity. It is also more perplexing to consider the dignity interests of playful pets dressed as nuns or brides when the human and animal relations are reciprocally beneficial. Although the subtler cases will always bewilder, the dignity idea forces reflection about particular animal relationships, personali-

⁴¹⁸ See *supra* notes 104–105.

ties, and situations. Dignity should assist judgments about affirmative obligations to animals because the idea stretches notions about animal potential. Considering dignity will not guarantee better lives for animals, but forgetting it almost ensures continuing animal harms. Animal ethics should extend physical and emotional needs to encompass the dignity due nonhumans as purposeful individuals with distinctive integrity.

Some may worry that recognizing animal dignity will diminish dignity concerns about humans, which would be disastrous given current human relations. I believe the opposite is true. Sensitivity to the dignitary interests of animals is more likely to expand empathy and respect for the diversity of life, including humans. Understanding ourselves as animals also softens the boundaries that have encouraged animal exploitation, making us humbler about our place on earth and in space beyond. We all struggle for survival, suffer, and eventually die. This common fate is a foundation for compassion. Albert Schweitzer discovered a “reverence for life” even though he lamented that all living beings exist at others’ expense.⁴¹⁹ That reverence belongs to all beings of dignity.

⁴¹⁹ Albert Schweitzer, *Reverence for Life*, in ENVIRONMENTAL ETHICS: READINGS IN THEORY AND APPLICATION, *supra* note 119, at 198, 200.