What is Animal Dignity in Law?

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Abstract

The article seeks to understand dignity in the context of primarily European animal law. Its main claim is that the notion of dignity is used in animal law discourse to express claims of more-than-welfarism. Whereas welfarism is premised on the humane treatment of animals and the prevention of unnecessary suffering, animal dignity is premised on respect for animals. However, adopting dignity-premised legal regulation does not necessarily entail the abandonment of welfarism. Rather, jurisdictions that have adopted dignity-based animal law have left welfarist regulations mostly intact. Hence, in its current stage of development, dignity-based animal law does not replace but rather augments the welfarist regime by “plugging its gaps”. Dignity-based animal law is then identified as consisting of four aspects: non-instrumentalization, egalitarianism, flourishing, and essence-respect. Finally, the article discusses the relationship of dignity to intrinsic value, arguing that the legal recognition of animals’ dignity is neither necessary nor sufficient for a recognition of their intrinsic value as individuals.

Keywords

Animal dignity, Animal law, Welfarism, Intrinsic value, Dignitarianism

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I. Introduction

One recent trend, visible in both animal law and animal ethics, is the increasing prominence of the notion of animal dignity. Scholars and theorists have discussed the potential and implications of animal dignity. However, animal dignity is not merely a scholarly idea – mentions of it can be found in both statutes and case law, especially in Europe. The reference to the “dignity of living beings” (or the “dignity of creation”) in the Swiss Constitution is, likely, by far the most central example. Luxembourg mentions animal dignity in its animal welfare statute, as does the Belgian jurisdiction of Brussels. Even though Denmark and Finland do not make explicit references to animal dignity in their animal welfare acts, certain provisions in these acts perform a similar function as more explicit references to dignity. Dignity has also been mentioned in some animal law cases in the Americas. The dignity of animals is discussed in, for instance, the case of Sandra, one of the most famous Argentinian animal rights cases. With the exception of some work done by animal ethicists and legal scholars, the notion does not seem to have made much headway in the United States.

1 Federal Constitution of the Swiss Confederation of 18 April 1999 (Status as of 1 January 2024), Art. 120. The original German phrase Würde der Kreatur has been translated into English in a number of different ways.

2 “La présente loi a pour objectif d’assurer la dignité, la protection de la vie, la sécurité et le bien-être des animaux.” Art. 1, loi du 27 juin 2018 sur la protection des animaux.

3 “Un animal est un être vivant doué de sensibilité, de propres intérêts et d’une propre dignité, qui bénéficie d’une protection particulière.” Art. 1, loi relative à la protection et au bien-être des animaux, 14 August 1986.

4 The Danish Animal Welfare Act states in Section 1 that the purpose of the law is to “promote respect for animals as living and sentient beings” (fremme respekt for dyr som levende og sansende væsener). Respect can here be seen as a dignity-based consideration. Section 13(4) of the Finnish Animal Welfare Act (693/2003) prohibits, for instance, the dyeing of animal furs for cosmetic purposes, which – I believe – cannot be understood merely in terms of welfarism.

5 Asociacion de funcionarios y abogados por los derechos de los animales y otros contra GCBA Sobre Amparo, expte. A2174-2015/0.

6 Such scholars include Martha Nussbaum, Lori Gruen and Steven Wise. Their views will be addressed below. There is at least one reference to animal dignity in US case law: one of the dissents in the Happy case remarked that “Happy may be a dignified creature, but there is nothing dignified about her captivity”. Judge Rivera’s dissent
This essay attempts to understand dignity primarily in the context of European animal law. My main aim is neither to defend nor criticise dignity, but simply to understand its uses in animal law. What I mean by “animal law” here comprises both the body of animal law – and, in particular, animal protection law – as well as animal law scholarship. I will mostly be excluding animal conservation law. Furthermore, given the close connections of animal law and animal ethics scholarship, I will also be considering views of dignity propounded in animal ethics.

In the theoretical scholarship on dignity, two approaches seem to be most prevalent. On one hand, some scholars seek to provide a taxonomy of what can be meant by “dignity” in academic or legal discourse. Others argue for a more specific understanding of dignity, often seeking to explain what is “distinctive” or “irreducible” about dignity. Here, my approach is closer to the taxonomical approach. I will, roughly, seek to explain what work the notion of dignity is doing in animal law discourses, rather than arguing for or against the irreducibility of the notion.

One important thread in the recent theoretical discussions on dignity and animals has been what Will Kymlicka calls “new dignitarianism”, meaning accounts that explain human dignity in terms of the unique status or worth of humans, and thereby quite explicitly excluding nonhuman animals. I will mostly sidestep this discussion and simply take the extension of dignity to animals as granted – though, as will become apparent, the implications of animal dignity for animal protection are much more limited than the body of human rights law that is seen to follow from human dignity.

My overall claim can be put as follows: the notion of dignity is used in animal law discourse to express claims of more-than-welfarism. Whereas welfarism is premised on the humane treatment of animals and the prevention of unnecessary suffering, animal dignity is premised on respect for animals. However, adopting dignity-premised legal regulation does not necessarily entail the abandonment of welfarism. Rather, jurisdictions that have adopted dignity-based animal law have left welfarist regulations mostly intact. Hence, in its current stage of development, dignity-based animal law does not replace but rather augments the welfarist regime by “plugging its gaps”.

I will argue that dignity has four aspects, and an account of dignity – as well as dignity-based animal law – relies on a combination of these aspects. These aspects are the following:

1. Non-instrumentalization: not treating animals as (mere) means.
2. Egalitarianism: not treating animals in demeaning ways, i.e. in ways that express lack of respect or low social standing.
3. Flourishing: respecting and safeguarding animals’ flourishing and capacities.
4. Essence-respect: refraining from certain acts toward animals or their constitutive parts (e.g. genome) because such acts would constitute disrespect towards something else, such as the species, nature or even “creation”.

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7 As Tero Kivinen has noted, the phrase “animal law” can mean a number of different things: It can, firstly and perhaps most importantly, refer to 1) a body of law, but it can also mean 2) animal law scholarship, 3) legal practice and 4) activism. Animal law as a body of law could also include, for instance, law related to the sale of animals, but it includes at least animal protection law. See Tero Kivinen, ‘Some Thoughts on the Definition of Animal Law’ (2019) 7 Global Journal of Animal Law 1.


Whereas the first three aspects have been discussed in the literature on animal dignity, the last aspect, essence-respect, seems to have received less attention.

The essay is structured as follows. I will first briefly present the notion of welfarism, which I take to be the paradigmatic ideology of prevalent animal protection law. After this brief introduction, I will first discuss the notion of animal dignity at a more general level and then present my account. I will use the Swiss Animal Protection Act\textsuperscript{11} as my primary example because it encompasses various aspects of dignity-based animal law, but I will also be employing other examples. In Section 4, I will consider how the legal recognition of dignity is connected to the recognition of intrinsic value. Section 5 will conclude.

II. Two types of animal law: welfarist and dignity-based

I have above characterized dignity-based animal law as more-than-welfarism: it augments and builds upon welfarism, rather than replacing it. Hence, I believe it is useful to start by briefly explaining what I mean by welfarism.

1. Welfarism

Welfarism is premised on protecting animals from human-caused unnecessary suffering and on maintaining a sufficient level of animal welfare.

I take welfarism to consist of two strands. The older \textit{animal-cruelty strand} consists of regulations that – as the name implies – prohibit cruelty toward animals and require their humane treatment. Regulations of this type focus on individual acts of cruelty, rather than regulating animal-exploitation practices. The newer strand, \textit{welfarism proper}, is instead focused on the boundaries of animal exploitation: it sets minimum requirements for animal welfare that must be met. This strand typically also contains positive obligations to animals, rather than merely negative obligations to refrain from certain cruel acts.

Both strands of welfarism are unified by the fundamental idea that animals should not be afflicted with unnecessary suffering.\textsuperscript{12} Animal law scholars tend to emphasize that “unnecessary suffering” is here interpreted narrowly: most suffering is understood as necessary under prevalent animal welfare law. Human interests weigh much more than animal interests, and even relatively trivial human interests may justify the affliction of animals with suffering.

Assuming this is a correct characterization of welfarism, we can note two features of welfarism that distinguish it from dignity-based animal law.

First, under welfarism, the \textit{regulation of human conduct and practices must be justified by reference to their impact on animal welfare}. Hence, welfarism is accepting of animal use and exploitation: the mere fact that animals are exploited and treated as means is not something to be avoided. Furthermore, welfarism does not prohibit acts or omissions merely because they would express disrespect toward animals. Consider questions such as the following: Should we treat dead animals’ bodies with respect? May we dress animals in funny and demeaning costumes? According to welfarism, these questions are reduced to questions of animal welfare. Dead animals’ bodies can no longer feel pain or pleasure, so

\textsuperscript{11} The official translation of the name of the statute is “Animal Welfare Act”, but the German name is \textit{Tierschutzgesetz}, meaning literally “Animal Protection Act”. I have here opted for the literal translation since the statute in question is not purely welfaristic.

\textsuperscript{12} The basic ideas of welfarism proper are outlined in the so-called Five Freedoms, including for instance freedom from hunger and thirst; freedom from discomfort; and freedom from pain, injury, or disease. These freedoms were originally outlined in FW Rogers Brambell and Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems (Her Majesty’s Stationery Office 1965).
there is no need to treat them with respect, whereas treating living animals in demeaning ways can only be problematic if it causes pain to the animals, or in some other way affects their welfare negatively. Welfarism can, therefore, be seen as a weak form of utilitarianism for animals. Dignity-based animal law, on the other hand, rejects this relatively narrow basis for animal protection law.

Second, welfarism is sentiocentric: it only protects animals who can feel pain, suffering or pleasure, and who can experience states of welfare – i.e. sentient animals.13 Dignity-based animal law, on the other hand, need not limit itself to sentient animals but can also protect animals that are insentient. Dignity-based animal law can even meaningfully require the respectful treatment of dead animals.

I will now lay out what I mean by dignity and dignity-based animal law, before then moving on to discuss aspects of dignity in detail.

2. Dignity and dignity-based animal law

To understand dignity-based animal law, we must first consider the notion of dignity itself. However, providing a satisfactory explanation of dignity is exceptionally difficult, and I cannot hope to offer a complete account of all the nuances of the notion here. Three high-level distinctions are, at least, relevant here.

First, the statement “X has dignity” can be understood in two different senses: as a claim independent of X’s social and/or legal status, or as a claim describing X’s status. Jeremy Waldron has famously noted that the term “dignity” packs into itself both the idea of dignitas, referring to a high social status, and Würde, meaning the Kantian idea of absolute (moral) worth.14 Here, one’s dignitas is dependent on how one is treated socially and/or legally, whereas one’s Würde is not: it remains the same, regardless of whether it is respected or recognized by others. Whether this idea of “worth” is the same as “intrinsic value” is a question I will return to later in this essay.

Second, discussions of “dignity” can be legal or moral. I will here mostly focus on the legal side of things, even if these two domains of normativity are often difficult to keep apart when discussing dignity.

Third, dignity can be understood as the source or justification of claims to certain kind of treatment, but also as figuring in the content of certain rights and duties. As Waldron notes, a prevalent idea is that dignity “grounds all of our rights”.15 More specifically, dignity is often understood to be the source of certain fundamental rights. Steven Wise calls such rights dignity-rights:

“Dignity-rights,” rather than “human rights,” better describes fundamental legal rights. This is because the phrase “dignity-rights” emphasizes that fundamental human rights derive not merely from being human, but from the dignity that is associated with qualities alleged or assumed to be universally shared by human beings.16

However, dignity can also figure in the content of rights. The “right to dignity”, or the “right to dignified treatment” is occasionally understood as a particular human right.

All these different distinctions are, to varying degrees, relevant in my account of dignity-based animal law.

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13 This is not say that all sentient animals would be protected by welfarist laws. Many countries limit the scope of application of their animal protection laws in various ways.
15 ibid 17.
I will now attempt to provide a relatively ecumenical account of *dignity-based animal law*, which I take to be the body of law that

1. is based upon the idea of animal dignity or respect for animals; and
2. does not merely consist in the protection of animals from cruelty or unnecessary suffering, or in the promotion of their welfare.

Prong (1) is here intended as ecumenical in the sense that it covers both dignity as *Würde* and as *dignitas*, as well as some other aspects of dignity that I will address below. The condition covers animal protection legislation that explicitly makes reference to *dignity* or to respect for animals, as well as legislation that does not explicitly make such references but that can be seen as building upon the idea of respect for animals.

Prong (2) is added here because of the vague nature of what “respect for animals” might mean. Even if “respect” is an elusive term, animal protection norms that are completely based on welfarism are not dignity-based. This condition might be seen as question-begging, designed to ensure that my argument of dignity-based animal law as “more-than-welfarism” is correct. However, appeals to dignity — at least in the European context, which I am focusing on here — seem to be based on the assumption that dignity can do the kind of work that welfarism cannot do. Hence, the exclusion of “pure” welfarism from dignity-based animal law is warranted.

III. What is respect? Aspects of dignity

It has so far been asserted that dignity-based animal law builds upon the notion of respect. However, the idea of “respect” is still admittedly vague and ambiguous — and it can, in fact, be cashed out in very different ways.

I will now present the four aspects of animal dignity, all of which reflect respect toward animals in different ways. Dignity-based animal law relies on a combination of these aspects. The aspects are:

1. Non-instrumentalization: not treating animals as (mere) means.
2. Egalitarianism: not treating animals in demeaning ways, i.e. in ways that express lack of respect or low social standing.
3. Flourishing: respecting and safeguarding animals’ flourishing and capacities.
4. Essence-respect: refraining from certain acts toward animals or their constitutive parts (e.g. genome) because such acts would constitute disrespect towards something else, such as the species, nature or even “creation”.

Diagram 1. Two types of animal law.

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**WELFARIST ANIMAL LAW**

**DIGNITY-BASED ANIMAL LAW**

- Animating idea: “humane treatment”, prevention of cruelty or unnecessary suffering, promotion of welfare.
- Animating idea: respect

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Overall, these different aspects overlap and interact in various ways. For instance, treating someone with low social standing can easily be conducive to treating them as means. However, these aspects are not completely reducible to each other.

Dignity-based animal law may build upon these aspects in various ways. There are two major variables. First, a legal system may emphasize different aspects of animal dignity in its animal protection legislation and case-law. Second, the protection and safeguarding of these aspects may take different levels of stringency. For instance, non-instrumentalization may take relatively weak forms – as with the prohibition of the “excessive” instrumentalization of animals under the Swiss Animal Protection Act – but it could, theoretically, take much stronger forms as well.

Let us now go through these in turn. I will be using the Swiss Animal Protection Act as an example of how many of these aspects – except, to some extent, essence-respect – are fleshed out.17 Article 3(a) defines “dignity” as follows:

\[
\text{dignity}\ \text{means the inherent worth of the animal that must be respected when dealing with it. If any strain imposed on the animal cannot be justified by overriding interests, this constitutes a disregard for the animal’s dignity. Strain is deemed to be present in particular if}
\]

[1] pain, suffering or harm is inflicted on the animal, if
[2] it is exposed to anxiety or humiliation, if
[3] there is major interference with its appearance or its abilities or if
[4] it is excessively instrumentalised.\]

Dignity is here operationalized using the notion of strain. Animals can be strained in various ways: not only by causing pain, suffering or harm, but also by disrespecting them in various ways – by humiliating them, interfering with their appearance or abilities, or excessively instrumentalizing them. However, strain can be justified by overriding interests, so this provision does not mean that animals could never be harmed, humiliated or instrumentalized, or that one could not interfere with their appearance or abilities at all.

I will now go through aspects of dignity and use this provision as the primary example, even if I will using other examples as well.

1. Non-instrumentalization

Non-instrumentalization is the prohibition of using others merely as means to one’s own purposes. The notion of non-instrumentalization builds most strongly on the Kantian notion of dignity as Würde – absolute value. Strong deontological duties are at the centre of Kantian ethics, and the categorical imperative prohibits using beings with dignity as mere tools. Rather, such beings should always also be treated as ends in themselves. Traditionally, animal abolitionism has advocated the complete abolition of animal use, and thereby the end of using animals as means. The vision of abolitionism would, therefore, mean the end of animal instrumentalization.

Rather than embracing full-blown Kantian ethics, the Swiss Animal Welfare Act contains a “watered-down” version of non-instrumentalization: instead of prohibiting the treatment of animals as means, the provision classifies excessive instrumentalization as strain.\(^\text{18}\) Hence, instrumentalization is still the acceptable point of departure, even if it may be prohibited in in certain cases.

\(^17\) Animal Welfare Act (AniWA) of 16 December 2005 (Status as of 1 January 2022).
\(^18\) However, Lena Hehemann has argued that the prohibition of excessive instrumentalization can be understood as the sacrosanct core of the Swiss notion of animal dignity. Lena Hehemann, ‘The Protection of the Dignity of Laboratory Animals in Switzerland: Different Procedures? Different Standards?’ (2018) 6 Global Journal of Animal Law 2.
If one follows the traditional welfarism/abolitionism bifurcation, non-instrumentalization can be seen as the binary opposite of welfarism. However, out of the four aspects of dignity, non-instrumentalization is, in fact, closest to welfarism in some regards.

For instance, even though welfarism as a rule permits animal exploitation, it does regardless prohibit certain forms of animal use. Hence, even welfarism can be seen as espousing certain weak forms of non-instrumentalization. Furthermore, one may even argue that protecting animals for their own sake from suffering does constitute treating them as more than mere means: their welfare is included in something resembling the utilitarian calculus, even if animal welfare weighs much less than human interests.

However, there are also clear differences between welfarism and non-instrumentalization. First, the justificatory bases for prohibiting a practice are different for welfarism and dignity-based animal law. For welfarism, the main reason for prohibiting a form of animal use is that the practice causes unnecessary suffering to the affected animals. Dignity-based animal law, on the other hand, constrains animal exploitation regardless of whether said exploitation might cause harm to the animal’s welfare. As Gieri Bolliger notes in his treatment of the Swiss law, excessive instrumentalization has to do with “aiming to use an animal solely as a human tool without giving consideration to its interests or its physical and psychological needs”.\(^{19}\) According to this description, whether the animal’s interests are in fact negatively affected is not pertinent; it is the actor’s disregarding attitude that is relevant here.

However, these different kinds of justificatory bases are, in the Swiss context, brought closer to each other by the fact that strains can be justified by overriding interests. This overriding-interests test resembles the weighing of interests implicit in the notion of unnecessary suffering.\(^{20}\)

2. **Egalitarianism**

One aspect of dignity-based animal law has to do with the lack of hierarchies. As noted above, Waldron has in his famous account of dignity argued that human dignity can be understood as the high rank of everyone.\(^ {21}\) Inspired by the work of Gregory Vlastos, Waldron invokes the notion of “an aristocratic society that has just one rank (and a pretty high rank at that) for all of us”.\(^ {22}\) To turn to our primary example of dignity-based animal law, the Swiss Animal Welfare Act classifies animal humiliation as strain. This can be understood as exhibiting the egalitarianist aspect of dignity.

We should here, again, note the weak nature of animal dignity in current dignity-based animal law. Whereas Waldron argues that human dignity means giving everyone the same high rank – treating everyone as aristocrats – this is hardly the case with animal dignity as it is currently enshrined in positive law. Rather, at most, the Swiss act prohibits relegating animals to the very bottom of the social ladder.

Now, the idea of egalitarianism and its application to nonhuman animals poses a problem: treating animals in demeaning ways is, clearly, often harmless – or almost harmless – from the animal’s point of view. As Lori Gruen points out, when discussing potential counterarguments,

> the animals themselves do not care that they are being laughed at and ridiculed. Most other animals do not have either the capacity or the desire to think about what humans think of them. [...] Seeing other animals as embarrassed, ashamed, or indignant, or alternatively


\(^{20}\) I have analyzed this in the Finnish context: Visa Kurki, ‘Förbudet mot åsamkande av onödigt lidande enligt djurskyddslagstiftningen’ [2011] Tidskrift utgiven av Juridiska Föreningen i Finland 290.

\(^{21}\) Waldron and Dan-Cohen (n 14).

\(^{22}\) Ibid 34.
suggesting that they enjoy being made to look absurd, always runs the danger of being a matter of human projection. Critics may suggest that attributing dignity or noticing events that violate the dignity of other animals is simply another expression of our human inability to perceive anything outside of our anthropocentric perspective.\textsuperscript{23}

Gruen touches upon some rather complex issues here. For instance, social animals might very well have their social hierarchies, and treating such animals in ways that denigrates them in their own societies could harm them rather concretely. However, what about animal treatment that is perceived as humiliating by human beings but whose social significance might go unnoticed by the animals?

I take the most convincing explanation for why such treatment might be wrong to have do with respect markings. Respect, or lack of it, is typically expressed by acts that have symbolic significance. C. E. Abbate writes that

> There are specific ways we “mark” our understanding that certain entities are, while others are not, resources, and these markings are often socially constructed.\textsuperscript{24}

Actions with these kinds of meaning can, according to Abbate, constitute expressive dignitary wrongs:

> Essentially, expressive dignitary wrongs refer to the performance of actions with a certain kind of meaning—i.e., actions that symbolically express that individuals with inherent value are not morally significant.\textsuperscript{25}

The most obvious examples of dignitary wrongs toward animals, according to Abbate, have to do with e.g. eating animal corpses, but they may also take other forms:

> painting the fur of animals in ridiculous colors, dressing animals in silly clothing or costumes, watching and sharing “funny” videos of animals that portray them as clumsy or stupid, spitting on animals, “dog shaming,” laughing at animals when they hurt themselves, bestiality, and so forth.\textsuperscript{26}

Tarunabh Khaitan puts forward a very similar idea in the context of human rights law, describing dignity as an “expressive norm” and claiming that the notion of dignity “takes seriously […] the expression of disrespect/insult/humiliation etc. to a cherished person, object or value”.\textsuperscript{27}

This kind of expressivism can be found in all of the aspects of dignity, but it is particularly relevant for egalitarianism. It can help explain why the Swiss legislator has chosen to classify animal humiliation as a strain, even in cases where such humiliation might not cause any direct, noticeable harm to the animal: humiliating an animal expresses disregard for the animal as an intrinsically valuable being.

### 3. Flourishing and species-based capabilities

Dignity is occasionally used to try to explain why modifying animals in certain ways can be wrong. In their statement on a “more concrete definition of the dignity of creation with regard to animals”, two Swiss federal committees have stated that “there should be a general prohibition on the production of genetically modified domestic animals, animals for leisure or sport, as well as animals produced

\textsuperscript{23} Lori Gruen, ‘Incarceration, Liberty, and Dignity’ in Andrew Linzey and Clair Linzey (eds), The Palgrave Handbook of Practical Animal Ethics (Palgrave Macmillan UK 2018) 162.

\textsuperscript{24} CE Abbate, ‘Valuing Animals as They Are—Whether They Feel It or Not’ (2020) 28 European Journal of Philosophy 770, 778.

\textsuperscript{25} ibid 781.

\textsuperscript{26} ibid.

\textsuperscript{27} Tarunabh Khaitan, ‘Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea’ (2012) 32 Oxford Journal of Legal Studies 1, 4.
solely for the purpose of manufacturing luxury goods.”28 Anne Lansink notes that genetically modifying animals might not cause any welfare harm to the animals, or “that the procedure in question even serves to reduce the amount of pain experienced by animals (for example, in the case of hornless calves).”29 Lansink suggests that the animals might be wronged regardless because

They are denied the opportunity to be the being that they actually are, and instead transformed into something that they are not, often in order to be used as an object by human beings.30

Welfarism cannot explain what is putatively wrong with such practices. Lansink suggests that dignity might “do the trick” and that Charles Foster’s account of human dignity as “objective flourishing” could work. “Flourishing” refers to a state of being that an entity has when it enjoys certain capabilities that are central for that kind of being. According to Foster’s account, flourishing has both a subjective and an objective element: the former has mostly to do with subjective experiences, whereas the latter is assessed in light of one’s species.31 Somewhat similarly, Martha Nussbaum has in her account emphasized that flourishing is assessed in light of one’s species.32 Many scholars working in animal ethics think that animal dignity is most plausibly understood in a species-specific manner. For instance, Sara Elizabeth Gavrell Ortiz notes that human dignity is often understood to ground a catalogue of rights, and argues that in the case of animal dignity, “an animal’s uninhibited development of those functions and operations that a member of its species can normally perform would play the central part in determining the content of the catalogue”.33

This aspect of dignity is seen most clearly in the Swiss Animal Protection Act’s listing of “major interference with [an animal’s] appearance or its abilities” as one type of strain. The formulation can be seen as implicitly employing a species-specific approach: by interfering with an animal’s appearance or abilities, we are meddling with their species-specific capabilities and features. The species-specific approach is explicit in Article 8 of the Swiss Act on Non-Human Gene Technology, according to which “violation of the dignity of living beings is deemed to have occurred if such modification substantially harms species-specific properties, functions or habits, unless this is justified by overriding legitimate interests”.34

Can flourishing do the trick? To an extent, yes – but not completely. Note first the non-identity problem.35 If we plan to alter a living animal in some way, we can indeed say that we are turning it into something that it is (currently) not. However, if we modify the genetic material of some animal species, and then create a new animal individual using that genetic material, we have not changed any

28 The Dignity of Animals. A joint statement by the Federal Ethics Committee on Non Human Biotechnology (ECNH) and the Federal Committee on Animal Experiments (FCAE), concerning a more concrete definition of the dignity of creation with regard to animals, 2008/2001, 9.
30 ibid.
individual animal into something that it is not. Rather – to use the terminology of Robert Streiffer and John Basl – we have substituted one animal (that never came into existence) with another.\textsuperscript{36} Calf A without horns has never been a calf with horns; the same calf \textit{with} horns exists only in an eerie world of counterfactuals. Now, the species-specific approach of Foster and Nussbaum can presumably account for this issue to a significant extent, as they measure flourishing (at least partly) in terms of species rather than individuals. Even if it is not in the nature of certain calves \textit{qua} individuals to have horns, it may be in their nature \textit{qua} members of their species. Hence, the lack of horns might affect their flourishing \textit{qua} members of their species.

However, there are at least two potential issues with the account just presented. Both issues can be approached by using examples from biotechnology. Consider the potential of “diminished animals”, meaning animals whose capabilities have been reduced in some way. One particular case that has interested philosophers working in this area is “animal microencephalic lumps” (AMLs): creatures whose brains are not capable of supporting consciousness or sentience, meaning that the organism is not able to experience the world. One can, first, ask whether the organism in question has the capacity to flourish in the sense typical of animal flourishing. If the organism can indeed flourish, this flourishing is closer to the flourishing of plants. Second, the criterion of species-specificity is problematic here. The concept of a species is difficult in itself, and Marcus Schultz-Bergin argues that by creating these kinds of organisms, we are actually “bringing a new species into existence”. He continues:

> In so doing, we are bringing a new “form of life” into existence, which will have its own set of capacities that must be respected (assuming it even constitutes a being with a dignity). What this means is that if chicken AMLs are blind, then sight is not a species-specific capacity of chicken AMLs; if chicken AMLs are insentient, then sentience is not a species-specific capacity of chicken AMLs; and so on. In short, it is not possible to violate an AML’s dignity in creating it since the capacities which constitute its dignity are determined by the process that created it.\textsuperscript{37}

Hence, it is not obvious that the notion of species-specific flourishing is helpful in these cases.

If we want to include such cases in our account of dignity, we must introduce a fourth, and perhaps the most elusive, aspect of dignity: essence-respect.

4. Essence-respect

In his treatment of abortion and euthanasia, Ronald Dworkin makes a distinction between “detached” and “derivative” arguments. One example of a detached argument against these practices is that they may deny or offend the sanctity of human life.\textsuperscript{38} This is, according to Dworkin, a detached argument: it is not based on the rights or interests of (say) the foetus, but rather on some more “objective” considerations: there is something inherently good in respecting human life. Derivative arguments, on the other hand, are derived from the interests or rights of the individuals involved. In this terminology, the aspects of dignity discussed so far have been derivative, whereas essence-respect is – at least predominantly – detached. Following Dworkin, I consider the term “sanctity” an apt synonym for “essence-respect”, though I will mostly avoid “sanctity” here due to its religious connotations.

This aspect of dignity is most pertinent in discussions regarding gene technology. It is, I submit, difficult to explain the putative wrongness of some forms of gene technology using only the notions of anti-

\textsuperscript{36} Streiffer and Basl (n 35) 840.


instrumentalization, egalitarianism and flourishing. Rather, there seems to also be a detached element involved here. Can the use of reproductive and genetic material from animals and other organisms can be wrong, even if the directly affected animals would not be wronged?

The first three aspects of dignity do not manage to capture this detached, general notion of respect. The fundamental idea of essence-respect here is that something should be treated with respect because of what it represents: by performing some action to X, we show disrespect toward Y, where X is an individual, concrete entity, but Y can also be an abstract object or idea, such as “the species of X”, “life” or “creation”.

If non-instrumentalization is strongly influenced by the Kantian notion of Würde and egalitarianism by dignitas, the notion of essence-respect can be seen as affiliated with Catholic ideas of dignity – even if it can be given a secular reading as well.

To give one religious example of what I mean by essence-respect, Andrew Linzey – drawing upon the works of Dietrich Bonhoeffer – talks of “God’s own rights in creation which we should respect by reverencing what is given”. He then develops his account of “theos-rights” for animals and claims that “[w]hen we speak of animal rights we conceptualize what is owed to animals as a matter of justice by virtue of their Creator’s right. Animals can be wronged because their Creator can be wronged in his creation. […] [T]he claims of animals are God-based claims of justice”.

Detached arguments or ideas can be discerned in many accounts of human dignity as well. For instance, George Kateb writes that

The core idea of human dignity is that on earth, humanity is the greatest type of beings—or what we call species because we have learned to see humanity as one species in the animal kingdom, which is made up of many other species along with our own—and that every member deserves to be treated in a manner consonant with the high worth of the species.

Hence, the “human dignity” outlined by Kateb here is not the dignity of individuals, but rather the dignity of the species.

Overall, the aspect of essence-respect can explain a number of intuitions occasionally expressed in dignity-talk, such as when reservations toward gene technology are expressed in terms of “humility” or the metaphor of “playing God”. This detached aspect of dignity has the most success in explaining why dignity might “do the trick” in some cases. The detached element can also be seen in the Swiss notion of the “dignity of living beings”: the German version, Würde der Kreatur, can be understood as having a religious significance, as it could be translated as the “dignity of creation”.

5. Discussion

The argument so far has been that dignity-based animal law can be seen as grounded in four aspects of dignity. Now, my claim is not that these aspects are completely separate. Rather, in many cases, they complement each other, and many instances of dignity-based animal law cannot be straightforwardly classified under only one aspect. For instance, as discussed above, non-instrumentalization can easily complement egalitarianism. However, these aspects can also come apart. Consider for instance

40 Linzey (n 39), 27
the vision of abolitionism, which advocates the end of animal domestication. This entails “cutting the ties” with animals and leaving them alone. The non-instrumentalization of animals is certainly at the core of abolitionism, but egalitarianism is, in many ways, peripheral: rather than treating animals with a high rank, this vision prioritizes leaving animals outside of human societies.

If this idea of dignity-based animal law as more-than-welfarism is accepted, we can also detect aspects of dignity-based animal law in legal doctrines that do not explicitly refer to dignity. For instance, an increasing number of European jurisdictions contain animal law norms that are not explainable in terms of welfarism. One of the purposes of the Animal Welfare Acts of Finland and Norway is to increase respect for animals (in addition to improving their welfare).\textsuperscript{43} Furthermore, the Finnish act prohibits the dyeing of animals with the purpose of changing their appearance – regardless of whether this causes pain or discomfort to the animal.\textsuperscript{44} The most plausible underlying rationale here is likely non-instrumentalization.

Before concluding this paper, I will now consider the connection of the recognition of animal dignity and intrinsic value.

IV. Dignity and intrinsic value

Intrinsic value, in a thin sense, means that some entity or state of affairs is “good in itself”. In philosophy, there is considerable disagreement regarding what this characterization means exactly, but I will sidestep most of those issues here. However, it is important to note that intrinsic value or cognate concepts can have somewhat different roles in various moral theories. For instance, in Kantian deontology, entities that are of absolute value may never be treated purely as means to an end, regardless of how good that end would be. According to mainstream utilitarianism, on the other hand, pleasure or happiness, or the satisfaction of interests, is the only thing that is intrinsically valuable. Beings that can experience pleasure or happiness, or that have interests, should be included in the overall consideration of the consequences of some act.

I do not plan to enter the moral debate over animals’ intrinsic value and dignity. What is more relevant is the issue of legal recognition: whether the ascription or recognition of animal dignity amounts to the recognition of their intrinsic value. Such a connection between dignity and intrinsic value is very commonly claimed.

The Swiss Animal Protection Act defines “dignity” as the “the inherent worth of the animal that must be respected when dealing with it”.\textsuperscript{45} Eva Bernet Kempers writes that “[a]mong scholars who suggest that the extension of dignity to other animals is possible, a common ground is the idea that ascribing dignity reflects the recognition that an entity deserves moral consideration for its own sake”.\textsuperscript{46} This should be qualified.

First, if we consider dignity more broadly, we will see that ascriptions of dignity do not always entail recognition of intrinsic value. One can for instance talk about the “dignity of the office of a judge”. Such talk likely does not entail recognition of the intrinsic value of said office. Rather, the understanding of dignity here is closest to essence-respect: the office has dignity because of what it represents. Similarly, the recognition of animal dignity does not necessarily mean the recognition of animals as

\textsuperscript{43} Animal Welfare Act (Finland), Section 1(2); Animal Welfare Act (Norway), Section 1.

\textsuperscript{44} Animal Welfare Act (Finland), Section 13(4).

\textsuperscript{45} Animal Welfare Act (AniWA) of 16 December 2005 (Status as of 1 January 2022), Article 3(a). (It is worth noting that the German term Eigenwert can be translated as either “intrinsic value” or “intrinsic worth”; I will mostly be using the phrase “intrinsic value”.)

intrinsically valuable individuals. An example would be if a conception of animal dignity, realized in some jurisdiction, were chiefly understandable in terms of their being a part of the creation or their role as part of the ecosystem. Hence, recognition of animals’ dignity is not necessarily sufficient for a recognition of their intrinsic value as individuals. Neither is it necessary: animals’ intrinsic value can be recognized, and has in fact been recognized in many jurisdictions, without a recognition of their dignity. For instance, Section 3 of the Norwegian Animal Welfare Act declares simply that “[a]nimals have intrinsic value regardless of the instrumental value they might have for people.” But, in fact, we may go even further: most types of welfarist regulations imply the recognition of the intrinsic value of animals.

Law can recognize the intrinsic value of animals either explicitly or implicitly. Section 3 of the Norwegian Animal Welfare Act is an example of explicit recognition. Implicit recognition, on the other hand, means treating animals as intrinsically valuable beings – by, for instance, protecting them in various ways that are not reducible to protecting their owners or other human beings. It is perfectly plausible to say that mainstream welfarism, in fact, presupposes the intrinsic value of animals. It is hard to make sense of many welfarist regulations unless one assumes that there is an explicit recognition of the intrinsic value of animals: that animals should be protected for their own sake. Of course, welfarist protections are admittedly weak in various ways, and they certainly do not amount to either a recognition of Kantian ultimate value to animals or to a utilitarian equal consideration of interests. Welfarism does, however, have some affinity with utilitarianism, given its focus on animal welfare, even if animals’ interests are at most given unequal consideration under welfarism, as opposed to the Singerian conception of the equal consideration of interests.

Hence, I take the intrinsic value of animals to be a broader category that also underlies both welfarism and dignity-based animal law, and that could underlie other types of animal protection regimes. And rather than entailing the intrinsic value of animals simpliciter, the legal protection of animal dignity implies the recognition of a subtype of intrinsic value: namely the kind of intrinsic value that warrants respect, of the kinds outlined here.

V. Conclusion

This essay has offered an account of animal dignity and dignity-based animal law. The primary task has not been to either defend or attack animal dignity, but rather make sense of it in contemporary animal law. Furthermore, the idea has not been to “colonize” all non-welfarist approaches under the – admittedly broad – idea of dignity, but rather simply explain the pragmatic function that references to dignity currently seem to serve.

I have argued here that welfarist animal law and dignity-based animal law are distinguished by different animating ideas, even if they also overlap to some extent, insofar as both can be used to justify similar animal protection law. However, these two approaches in fact share the potential for more convergence, especially with regard to the aspects of non-instrumentalization and flourishing. Such a

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48 This does not apply to regulation that is only designed to prevent people from witnessing animal maltreatment, for instance by only prohibiting public displays of animal cruelty. Such regulation can be explained in terms of protecting people’s feelings rather than protecting animals directly.

claim may seem surprising. As discussed above, welfarism is mostly indifferent toward exploitation: what matters are the welfare consequences of exploitation, not exploitation in itself.\footnote{See Robert Garner’s discussion of the similarities and dissimilarities of welfarism and utilitarianism: Gary L Francione and Robert Garner, \textit{Animal Rights Debate: Abolition or Regulation?} (Columbia University Press 2010) 107ff.}

However, welfarism is a \textit{legal} approach, and law mostly works through rules. Even if the prohibition of afflicting animals with unnecessary suffering is the bedrock of welfarism, it would not be workable to have an animal welfare act with only one section, stating that “It is prohibited to inflict unnecessary suffering upon animals”. Rather, animal welfare acts typically ban certain practices and regulate other practices, usually in a relatively detailed manner. Many of the rules resulting from these statutes are not—or at least should not be—subject to any kind of “necessity” tests, as the lack of necessity has already been determined by the legislator. Now, assuming that an increased number of practices are banned because they are deemed to be causing unnecessary suffering to the affected animals, we can see certain “pockets” of non-instrumentalization emerging as a result. Even arch-abolitionist Francione agrees with this assessment, assuming certain criteria are met.\footnote{Whether such bans can be seen as steps toward abolitionism is something on which abolitionists disagree. Gary Francione writes that “[f]or example, a proposal to eliminate entirely the dehorning or castration of animals used for food or to eliminate the battery cage completely arguably [...] recognizes that animals have inherent value and interests that go beyond those necessary to ensure that animals are fit for the type of exploitation at issue and its prohibition is not accompanied by a substitution of other forms of exploitation”. Gary Francione, \textit{Rain without Thunder: The Ideology of the Animal Rights Movement} (Temple University Press 2010) 214. For a different view, see Joan Dunayer, ‘Advancing Animal Rights: A Response to “Anti-Speciesism,” Critique of Gary Francione’s Work, and Discussion of Speciesism’ (2007) 3 Journal of Animal Law 1, 16.}

It is relatively clear that dignity-based animal law is a rather multifarious notion, with potential for a number of different developments. As it stands, dignity-based animal law is weak, much like welfarism. Animal dignity is normally only protected from egregious violations, and even such violations may be justified by overriding interests. However, this is not to say that the current relativized and, in many ways, watered-down version of dignity could not become something much more robust. Animal dignity could be a springboard for further development of animal law in a number of ways. The perhaps clearest example could be the development of case law based on the Swiss constitutional provision, but many others are possible as well.

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