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### The Concept of Human Dignity in Human Rights Discourse

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Dignity is, to begin with, an undemocratic idea. The central notion etymologically, both in English and in its Latin root (*dignitas*), is that of worthiness, elevation, honor, nobility, height—in short, excellence or virtue. In all its meanings it is a term of distinction. Dignity is not something which, like a nose or a navel, is to be expected or found in every living human being.

—Leon Kass, *Life, Liberty and the Defense of Dignity*

## 1. Introduction

Few concepts have been as central to human rights discourse as human dignity. Since the end of the Second World War, the concept has played three important roles in human rights theory and practice. One role is as a conceptual tool for understanding the equal moral status of human beings. A common claim among human rights supporters, for instance, is that all humans have equal dignity and thus are worthy of respect from moral agents. Another role is as the object of human rights protection. Whatever else human rights might do, their normative purpose is said to be the protection of human dignity. The most important role human dignity plays is as the basis for human rights. Human dignity tells us why human beings have human rights. The concept came to serve this function mainly due to the significance and popularity of the International Bill of Rights (IBR). The IBR, which is constituted by the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR), is the cornerstone of human rights discourse. Though primarily a list of rights that reflects a political consensus rather than a philosophical argument, the IBR identifies human dignity as the ultimate foundation for those rights. The UDHR does this indirectly in Article 1, which claims that “[a]ll human beings are born free and equal in dignity and rights” (United Nations 1948).<sup>1</sup> However, the preambles to both the ICESCR and

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<sup>1</sup> The UDHR does not make the relationship between human dignity and human rights precisely clear. Nonetheless, records of drafting committee meetings reveal that the drafters did understand dignity as the basis of human rights. In her celebrated book on Eleanor Roosevelt and the UDHR’s drafting process, Mary Ann Glendon notes that in response

ICCPR are more straightforward. They claim that the “inalienable rights of all members of the human family . . . derive from the inherent dignity of the human person” (United Nations 1966).

Although largely exempt from criticism, the concept of human dignity has its detractors. Some philosophers and legal and political theorists have expressed doubt about the concept’s ability to do what its proponents in the discourse ask of it. Their doubts are based on what has become a common criticism: that human dignity is conceptually ambiguous. Over the past four decades, various thinkers have raised this objection in one form or another.<sup>2</sup> Take Mirko Bagaric and James Allan, for instance. They argue that human dignity is “vacuous” because it lacks clear conceptual boundaries. In their words, the concept is “boundless.” This boundlessness occurs at two conceptual levels. At one level, the meanings for dignity are boundless. According to Bagaric and Allan, dignity simply has too many meanings, and “the diversity in the range of meanings that can credibly be assigned to the concept . . . raises a presumption that something is amiss” (Bagaric and Allan 2006, 265). At another level, the sources or bases for dignity are boundless. Bagaric and Allan argue that there is “no obviously available explanation of [the concept’s] source” (268). Put differently, there is no authoritative and commonly agreed upon source for dignity. Because of this twofold conceptual indeterminacy, Bagaric and Allan propose that “dignity should be discarded as a potential foundation for rights claims unless, and until, its source, nature, relevance and meaning are determined” (269).

I generally agree with critics like Bagaric and Allan. A cursory look at discussion of human dignity in human rights discourse reveals that the concept has a certain degree of ambiguity.

Nonetheless, I think the concept is clearer than the critics suggest. This paper attempts to show that

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to doubts about whether Article 1 should make any reference to dignity, “Mrs. Roosevelt . . . said that the word *dignity* had been considered carefully by the Human Rights Commission, which included it in order to emphasize that every human being is worthy of respect. In the scheme of the Declaration, Article 1 did not refer to specific rights because it was meant to explain why human beings have rights to begin with” (Glendon 2001, 146).

<sup>2</sup> See, for example, Spiegelberg 1970; Orend 2002; Bagaric and Allan 2006.

there is something common among proponents of human dignity that sheds light on the concept's meaning. We can see this commonality when we consider the concept historically and look at how thinkers from antiquity to our contemporary period have tried to justify human dignity claims. What becomes apparent when we do this is that there has been a common understanding about how a justification for human dignity functions. That understanding is this: that a justification is intended to function, that is, validate and give force to a dignity claim, through a characterization of humans as having excellence in some respect(s). Understanding this aspect of human dignity, which I will refer to as *the excellence component*, sheds light on the concept's meaning because it suggests that excellence has been an important part of what it means to speak of human dignity. In other words, it suggests that however human dignity is explicitly defined and whatever else it may mean, its meaning involves a claim about some kind of human excellence.

In addition to drawing our attention to the excellence component, this paper attempts to show how the idea of excellence helps to establish a problem. Claims of universal (or quasi-universal) human dignity abound in human rights discourse. Nonreligious versions of these claims, however, are at odds with the idea of excellence. This conflict, I argue, is rooted in a deeper tension between the ideas of excellence and universality (or quasi-universality) as normative criteria for dignity-conferring properties. The tension reveals itself in contemporary debates about human dignity and the "marginal cases problem." Since the concept's beginnings, thinkers have grounded human dignity on the possession of some high-level cognitive function (e.g., rationality or autonomous agency). Consequently, certain human beings, namely, infants, elderly persons with dementia, and the profoundly mentally disabled, have been excluded from dignity's scope. Several notable efforts have been made to secure members of these excluded groups within dignity's boundaries in a way that meets the excellence component and fulfills the universality (or quasi-

universality) criterion without turning to theism. I contend that the best of these attempts are unsuccessful because they do not satisfy both normative criteria and that these failures suggest that the excellence/universality tension is irresolvable in nontheistic terms.

To develop my arguments, I next attempt to substantiate my claim that the excellence component has been an essential part of the human dignity tradition by looking at five different conceptions of the concept. Three of the conceptions are the historically influential accounts of the ancient Roman statesman and philosopher Marcus Tullius Cicero, the medieval Christian theologian and philosopher St. Thomas Aquinas, and the eighteenth-century German philosopher Immanuel Kant. The other two conceptions are contemporary accounts by the Christian theologian and philosopher Nicholas Wolterstorff and philosopher James Griffin. In section three, I lay out how the excellence component conflicts with nonreligious claims of universal human dignity by critically engaging with three attempts to resolve the marginal cases problem without turning to theism. The three proposed solutions I examine are the rational nature view of philosopher Patrick Lee and legal and political theorist Robert George, the “Aristotelian view” of philosopher Martha Nussbaum, and the “equal dignity view” of philosopher Eva Kittay. Ultimately, through my engagement with these thinkers, I aim to show that the unresolved tension between excellence and universality gives us greater reason to doubt that the concept of human dignity can do what its proponents would like it to do.

## **2. The Excellence Component**

Present-day claims about human dignity are part of a very long tradition of discourse on the concept that stretches back to ancient Rome. Within this tradition human dignity has been defined

and understood in a multitude of ways. My concern, though, is not the differences but an important commonality among historical and contemporary proponents of the concept. Underlying the various meanings and understandings is a widely shared belief about what kind of justification suitably grounds a human dignity claim. This belief holds that a justification for human dignity is one that characterizes humans as having some kind of excellence. Put slightly differently, the belief maintains that a human has, or should be thought of as having, or should be ascribed dignity because she possesses or exemplifies some excellence. Now a couple of comments are necessary to avoid misunderstanding. First, “excellence” here refers to two things: one, the quality of being superior; and/or two, a superb, in contrast to ordinary, characteristic. Neither of these meanings is technical. Both are similar to definitions of excellence suggested by the *Oxford English Dictionary*, which claims that excellence is “[t]hat in which a person or thing excels; an excellent feature or quality.”<sup>3</sup> Second, I am not claiming that proponents of human dignity have put things in exactly these terms. Acceptance of the belief appears in different ways in different historical periods. Some proponents use the language of excellence while others speak in different terms. Whatever the expression, I shall show that it captures one or both of the meanings of excellence.

The presence of the excellence component within the tradition is illustrated in the historical writings of Cicero, Aquinas, and Kant, and in the contemporary writings of Nicholas Wolterstorff and James Griffin. I have chosen to focus on Cicero, Aquinas, and Kant because of their unparalleled influence on contemporary understandings of human dignity. Whether in discussion about human rights, bioethics, constitutional law, or the concept of human dignity itself, scholars regularly reference one of these thinkers to generally do one of three things: to appeal to the authority of a well-known (even if not well understood) conception of human dignity; to invoke a

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<sup>3</sup> *Oxford English Dictionary*, 2<sup>nd</sup> ed., s.v. “excellence.”

well-known conception so that it might be improved; or to invoke a well-known conception so that it can be used as a point of criticism and contrast. I have chosen to focus on Wolterstorff and Griffin because they represent two of the clearest and well worked out conceptions of human dignity in contemporary thinking. Additionally, they illustrate that a belief in the idea of excellence can be found in conceptions of human dignity that are rooted in fundamentally different worldviews: Wolterstorff presents a conception that is deeply theistic, whereas Griffin presents a nontheistic conception.

I begin with Cicero, for he offers the first known textual example of the use of the concept of human dignity. The concept appears in his moral philosophical work *On Duties*.<sup>4</sup> Strictly speaking, like most thinkers prior to the twentieth century, Cicero ascribes dignity to human nature. He writes, “[i]f we wish to reflect on the excellence and worthiness [*dignitas*] of our nature, then we shall realize how dishonourable it is to sink into luxury and to live a soft and effeminate lifestyle, but how honourable to live thriftily, strictly, with self-restraint, and soberly” (Cicero 1991, 41). By worthiness, Cicero means fitness or appropriateness.<sup>5</sup> This is indicated by the context of the dignity claim. Cicero invokes human dignity in an argument about whether a hedonistic lifestyle is appropriate for the superior nature of human beings. His argument, in brief, is that hedonism “is not sufficiently worthy of the superiority of man [i.e., human nature] and . . . should be scorned and rejected” (ibid.). Hedonism’s insufficiency stems from the idea that the superiority of human nature is based on “the fact that we all have a share in reason” rather than on the fact that our bodily

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<sup>4</sup> For a more detailed account of Cicero’s conception of human dignity, see Cancik 2002. Cancik speculates that Cicero’s use of human dignity in *On Duties* is taken from *On Appropriate Actions*, a text written by the Greek Stoic Panaetius of Rhodes around 128 BCE (Cancik 2002, 22). If this is true, then the first textual instance of the concept occurs in ancient Greece. However, since the text is lost, Cicero’s debt to Panaetius on this issue cannot be determined.

<sup>5</sup> My interpretation differs from those who interpret Cicero’s use of dignity in the respective passage as worthiness of respect, or respect-worthiness (Cancik 2002; Lebech 2006). One reason to read Cicero this way is that he explicitly defines dignity in such terms in his first book *On Invention*: “Dignity is someone’s virtuous authority which makes him worthy to be honored with regard and respect” (Cicero 1949, 333).

pleasures can be satisfied (42). What I want to highlight is the phrase “not sufficiently worthy.”

This phrase implies that something is not suitable or appropriate. With this in mind, and considering the etymology of *dignitas*,<sup>6</sup> Cicero’s call to reflect on the worthiness of human nature is a call to reflect on what is fitting, or appropriate, for that nature.

Cicero grounds dignity thus understood on his belief that the capacity to reason is a constitutive element of human nature. Yet he leaves this implicit in the text, and it can only be inferred from and understood through the context of the dignity claim and other writings. Again, hedonism is unworthy of human nature’s superiority because that superiority is rooted in a human being’s share in reason, not in the satisfaction of bodily pleasures. Sharing in reason, consequently, is the standard of judgment for understanding the fitness of human nature. Generally, to share in reason is to participate, along with the gods, in the rational force that pervades and organizes the universe. Specifically, however, it involves several high-level cognitive functions<sup>7</sup>: awareness of temporality (awareness of the past, present and future); awareness of causality (ability to “perceive consequences, to comprehend the causes of things, their precursors and their antecedents . . .”); the capacity to use causal logic (the ability “to compare similarities and to link and combine future with present events”); the capacity to use foresight (the ability to see “the whole course of life [and] to prepare whatever is necessary for living it.”); the capacity to understand and engage in justice (the ability to refrain from harming another unless provoked and to treat common goods as common and private goods as private); and the capacity to understand natural law (the ability to understand what

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<sup>6</sup> *Dignitas* derived from *dignus*, which in turn derived from *decet*. According to the *Oxford Latin Dictionary*, *decet* means, among other things, “(of persons) to be right or fitting for, become.” As for *dignus*, the *OLD* lists “Appropriate, suitable, worthy” as the term’s primary meaning. Similarly, the primary meaning of *dignitas* is “Fitness (for a task, etc., stated or implied), suitability, worthiness.”

<sup>7</sup> Descriptions of the first five functions can be found in Cicero 1991, 6 and 9. The last function is described in Cicero 1999, 111.

actions reason commands and prohibits). It is through the awareness and exercise of these functions that a human being's nature is fit.

To get at how Cicero illustrates the excellence component, we need to ask the following question: why does the capacity to reason, or sharing in reason, set the standard for determining the fitness of our nature? Cicero answers this question, but only indirectly. His answers come from the ways in which he describes reason throughout his works. One answer, which is in the context of Cicero's dignity claim, is that the capacity to reason is what allows humans to excel nonhuman animals in being a qualitatively better kind of animal. Humans, according to Cicero, are one kind of animal among others and share a number of characteristics with their nonhuman counterparts, such as the tendency to be concerned with self-preservation and an impulse to care for offspring. What distinguishes humans is the capacity to reason; it is what Cicero calls "[t]he great difference" (6). But this capacity doesn't just differentiate human beings from other animals; it makes them superior, for "the nature of man surpasses domestic animals and other beasts" because "[a] man's mind is nourished by learning and reasoning" (41). Another answer to the question is that reason is a superb characteristic. This answer is best exemplified in what Cicero says about reason in *On the Laws*. In this dialogical treatise on natural and civil law, one interlocutor, Marcus (who we can assume is Cicero), asks another, Atticus, to grant "that all nature is ruled by the force or nature or reason or power or mind or will . . . of the immortal gods" (Cicero 1999, 112). After Atticus concedes the point, Marcus then goes on to explain that of all other animals, only humans were given "a share in reason and thought" with the immortal gods (113). He then asks rhetorically, "What is there, not just in humans, but in all heaven and earth more divine than reason?" (ibid.). The response, it seems, is supposed to be that nothing is more divine than reason. Cicero's

description of reason as divine is indicative of what kind of quality he takes reason to be. It is not just an ordinary quality; rather, it is something great, something marvelous.

The decline of the Roman Empire facilitated the disappearance of many Roman-era ideas. Through Christian theology, however, the concept of human dignity carried on. During the early centuries of Christianity the Church Fathers adopted the concept and situated it within Christian belief.<sup>8</sup> Subsequently, the concept became a staple in theological writings, most notably in the medieval writings of Aquinas. In his most familiar work, the *Summa Theologiae* (*Summa Theologica*), Aquinas treats humans as having dignity (*dignitas*) in two senses. In one sense, they have a high rank within God's created order of nature. This rank is third among five. In line with the common Christian view, Aquinas assigns the first rank to God, the second to the angels, the third to human beings, the fourth to nonhuman animals, and the fifth to plants. Importantly, while Aquinas does think a human's rank is natural, he does not think it is held under any and all conditions. A human can demote herself through sin. The second sense of dignity is worth. It is unclear whether Aquinas thinks this worth is intrinsic in the way that contemporary proponents claim that dignity is intrinsic. Some scholars suggest that he does, because in an early work, *Sentences on Peter Lombard*, he says that dignity "signifies something's goodness for its own sake."<sup>9</sup> However, at least in the *Summa*, Aquinas seems to never mention this definition. Furthermore, given that he thinks a human's rank is contingent upon acting virtuously, he could also think a human's worth is contingent in the same way. So ascribing the intrinsic worth definition to Aquinas is questionable.

Less questionable is the basis for human rank and worth. Aquinas grounds both on his conception of *imago Dei* — the Genesis-based idea that God created human beings in His image. Following Damascene, he holds that humans are "made to God's image, in so far as the image

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<sup>8</sup> For an account and examples of this development, see Soulen and Woodhead 2006.

<sup>9</sup> Finnis 1998, 179 n. 219; Gormally 2002.

implies an intelligent being endowed with free-will and self-movement” (Aquinas 1947, *ST* I-II, q. 1). Each one of these characteristics—being an intelligent being, having free will, and having self-movement—is proposed as a basis for human dignity, and all involve high-level cognitive functions.<sup>10</sup> Being an intelligent being entails having what Aquinas calls “intellectual powers.” In all, there are five powers<sup>11</sup>: the “passive intellect” (the mind’s potential [*potentia*] to receive and understand “intelligible truths,” namely, facts about reality that are capable of being understood); the “active intellect” (the mind’s “power to make things actually intelligible” through its ability to abstract); “memory” (the mind’s ability to retain the knowledge acquired through abstraction); “reason” (the mind’s ability to use “discursive thought,” namely, discovery, investigation, comparison, and analysis); and the “speculative” and “practical” intellects, which Aquinas treats as one power (the mind’s ability to direct what it understands to our knowledge of what we can know or what we should do). Having a free will entails having the capacity to make judgments based on reason rather than natural instinct.<sup>12</sup> Having self-movement, finally, is the capacity to direct one’s actions towards ends rather than having those actions directed by someone or something else.<sup>13</sup>

Like Cicero, Aquinas exemplifies the excellence component in an indirect way. He never says that humans have their high rank and worth because through the *imago Dei* they possess or exemplify a kind of excellence; but he strongly suggests this, and does so in at least two ways. First,

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<sup>10</sup> Being an intelligent being is offered in *ST* III, q. 4, a.1, in which Aquinas claims that human nature has “dignity, because . . . as being rational and intellectual, [it] was made for attaining to the Word to some extent by its operation, viz. by knowing and loving Him.” What he is saying here is that human nature has dignity because its intellectual powers enable it to know and love God and, consequently, acquire some knowledge of the Word, namely, all things in their perfection. Aquinas proposes free will and self-movement as bases in *ST* II-II, q. 64, a. 2, in which he claims that “By sinning man departs from the order of reason, and consequently falls away from the dignity of his manhood, in so far as he is naturally free [i.e., is capable of free will], and exists for himself [i.e., is capable of self-movement]. . .”

<sup>11</sup> Each power is described in *ST* I, q. 79.

<sup>12</sup> Aquinas discusses free will in *ST* I, q. 83.

<sup>13</sup> Aquinas discusses self movement in *ST* I, q. 22, a. 2, and *ST* I-II, q. 1, a. 2.

he explicitly and regularly claims that humans excel nonhuman animals by virtue of being intelligent beings. Early in the *Summa*, for instance, he writes,

Man is said to be after the image of God, not as regards his body, but as regards that whereby he excels other animals. Hence, when it is said, ‘Let us make man to our image and likeness’, it is added, ‘And let him have dominion over the fishes in the sea’ (Genesis 1:26). Now man excels all animals by his reason and intelligence; hence it is according to his intelligence and reason, which are incorporeal, that man is said to be according to the image of God. (*ST I*, q. 3, a. 1, ad. 2).

Just what humans excel in is not entirely clear. On the one hand, Aquinas could be read as saying that both human and nonhuman animals are capable of mental functions (e.g., judgment), but intelligence and reason allow humans to excel in those kinds of functions. On the other hand, he could be read as saying generally that humans and nonhuman animals are kinds of creatures, but intelligence and reason allow humans to excel in being a qualitatively better kind of creature. I am not sure how to read Aquinas here. Either way, it is clear that he thinks intelligence and reason allow humans to surpass nonhuman animals. The second way Aquinas suggests that the *imago Dei* is a kind of excellence is in his discussion of a creature’s “likeness” (i.e., resemblance) to God. According to Aquinas, things can be like God in three ways: because they exist; because they exist and are animate; or because they exist, are animate, and capable of knowing and understanding. Those things that are like God in the third way, Aquinas says quoting Augustine approvingly, “‘approach so near to God in likeness, that among all creatures nothing comes nearer to Him’” (*ST I*, q. 93, a. 2). Because humans are intelligent beings, they are capable of knowing and understanding. Humans, therefore, excel other creatures in their closeness to God. Both of these forms of excelling give us reason to think of the *imago Dei* as a source of human excellence.

After Aquinas, Kant presents the most important account of human dignity. Between the two thinkers spans a great deal of time, about four hundred and fifty years. Also between the two are

other thinkers who have (or are thought to have) something to say about human dignity.<sup>14</sup> None, however, has left as large an impact as Kant on the way many people presently think about the concept. Though Kant doesn't write much or in great depth about "dignity" (Würde, *dignitas*), he gives the concept a key role in his moral philosophy as a particular kind of value.<sup>15</sup> Dignity, as he describes it, is an "inner," "unconditional," "incomparable," "absolute," and "inalienable" worth. As such, it is distinct from "price" (Preis, *pretium*), which is a "relative" and "extrinsic" worth. These two values are fundamentally distinguished by the kinds of ends to which each applies. Whereas price applies to "relative ends," dignity applies to "objective ends." On the whole, an "end is the object of the choice (of a rational being) . . ." (Kant [1797] 1996, 146). Relative ends are unique, however, in that they are replaceable, desired because they satisfy some inclination, need, or personal preference, and can be commodities to be bought and sold. In contrast, objective ends, or "ends in themselves," are irreplaceable, necessary to have because pure reason makes them so, and are not (or at least should not be thought of as) commodities. Price applies to relative ends because such ends would not have any worth if they did not satisfy some inclination, need, or preference. Thus, the worth of a relative end is *relative* to some inclination, need, or preference. Dignity, conversely, applies to objective ends because such ends can and do have worth irrespective of any inclination, need, or preference. For Kant, accordingly, humans have dignity insofar as they are or can be thought of as objective ends.

As Kant sees it, we do not have sufficient grounds for thinking of a human being in such terms if we only consider her as an animal in the natural world; we do, however, if we view her as a

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<sup>14</sup> Two such thinkers are the Renaissance humanists Gianozzo Manetti and Giovanni Pico della Mirandola. In response to a popular tract written by Cardinal Lotario di Segni (later Pope Innocent III) titled *On the Misery of the Human Condition* (c. 1190s), Manetti wrote *On the Dignity and Excellence of Man* (1452), which in contrast to the Cardinal's piece, highlights the high value of a human's capacities and place in the universe. Pico does something quite similar in his famous speech *Oration on the Dignity of Man* (1486). Interestingly, the speech was never given and its title was ascribed only after Mirandola's death.

<sup>15</sup> See Kant [1785] 1998; [1788] 1997; [1797] 1996.

“person,” namely, in terms of “the freedom of a rational being under moral laws” (16). To think of a human being as a person is to think of her as belonging to an “intelligible world” and having an autonomous will. Though both ideas are inextricably related, what matters here is the idea of an autonomous will, since it is through an autonomous will that a human can be an objective end and thus have dignity. Kantian autonomy involves a high level of cognitive function at two levels. First, autonomy essentially refers to a human being’s capacity to legislate moral laws (principles) for herself in accordance with reason. But for a human being to be thought of as having this capacity, and here is the second level of high cognitive function, she must first have “humanity,” which, as Allen Wood notes, “refers to our *rational nature*, and specifically to the capacity to set ends for oneself, devise means to them, combine them into more comprehensive ends, setting set priorities among them” (Wood 2007, 9). If a human being cannot set ends for herself, then she certainly cannot prioritize or pursue her ends in a morally responsible way, which is precisely what autonomy is supposed to enable human beings to do.

So why is autonomy the basis for inner worth? Well, ultimately, it seems to be because autonomy allows humans to surpass nonhuman animals and themselves (insofar as they are merely animals in the natural world) in being particular kinds of beings. Kant intimates this in his idea of the “two standpoints” from which human beings can understand themselves. He does this most clearly in the *Metaphysics of Morals* when he argues that a human being “can and should value himself by a low as well as by a high standard, depending on whether he views himself as a sensible being (in terms of his animal nature) or as an intelligible being (in terms of his moral predisposition)” (Kant [1797] 1996, 187). To view oneself as a “sensible being” is to view oneself as nothing more than an animal in the natural world. Implicit in this view is the idea that one is entirely subject to the causal laws of the natural world and, furthermore, the kind of agent whose

actions are completely determined by inclination or impulse. To view oneself as an “intelligible being,” on the other hand, is to view oneself as a rational being in an “intelligible world,” that is, a world purely in thought. From this perspective, a human being is not wholly *subject* to causal laws and determined by inclination and impulse; rather, she is the *source* of (moral) laws through her autonomy and is free to choose her course of action based on reason. It is from this second standpoint that Kant thinks a human being can value herself as “exalted above any price” and possessing “a *dignity* (an absolute inner worth)” (186). In contrast, Kant thinks that, viewed from the first standpoint, a human should value herself as “a being of slight importance . . . [who] shares with the rest of the animals, as offspring of the earth, an ordinary value (*pretium vulgare*)” (ibid.). This idea of two standpoints of evaluation suggests three things: one, that dignity is a superior value compared to price; two, that the standard for valuing oneself as having dignity is superior to the alternative standard; and three, that the standard for dignity is superior because its basis, that is, being autonomous, is superior to the basis for the alternative standard.

My next two examples of the excellence component bring us to the contemporary period. The first is Nicholas Wolterstorff. In 2008, Wolterstorff published an impressive book on justice, which develops a detailed theistic account of human rights. In that work, he spends quite a bit of time fleshing out a conception of human dignity that takes the meaning of worth seriously. Instead of intrinsic, inherent, inalienable, absolute, or fundamental, he describes human dignity as the “non-instrumental worth” of human beings (Wolterstorff 2008, 355). Yet he means something quite specific by non-instrumental. On his account, there are two kinds of non-instrumental worth. One kind is “non-basic aspectual worth,” which refers to the idea that some things have non-instrumental worth only because they have some aspect that itself has non-instrumental worth (ibid). The other kind is “basic non-instrumental worth,” which seems to refer to the idea that, irrespective of any

aspect, some things simply have non-instrumental worth. Having made this distinction, Wolterstorff argues that there are various kinds of non-basic aspectual worth. Among these is “bestowed worth,” namely, the non-instrumental worth things may have by virtue of “their standing in some relation to something other than an aspect of themselves” (ibid.). In other words, bestowed worth is the non-instrumental worth a thing may have because of its relation to something external to itself rather than because of some aspect it possesses internally. Human worth, for Wolterstorff, is bestowed worth. Thus, in describing human dignity as a non-instrumental worth, Wolterstorff is claiming that it is a bestowed, non-basic, non-instrumental aspectual worth.

The basis for this worth is a hypothetical relationship of love between human beings and God. Wolterstorff argues that “if God loves a human being with the love of attachment, that love bestows a great worth on that human being” (360). “Love of attachment,” or “love as attachment,” is one of three kinds of love distinguished by Wolterstorff.<sup>16</sup> It involves loving an object because one has become attached to it through bonding, not because one finds a particular characteristic of the object appealing or because one has a duty to preserve or enhance the object’s well being. In addition to bestowing worth upon the object, love as attachment gives the object an enviable status. Wolterstorff fleshes out this idea through the example of a queen befriending and becoming attached to someone in her monarchy:

This [attachment] quite clearly bestows a certain worth on the one befriended. She is now honored and envied in ways she was not before. The source of the envy may be the tangible favors that the queen bestows on her friend. But the queen may not bestow any such favors. Nonetheless, others will be envious; they will regard the mere status of being a friend of the queen as enviable. (359).

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<sup>16</sup> The other two are “love as attraction” and “love as benevolence.” Love as attraction involves loving an object because it has some appealing quality that has drawn one to it, while love as benevolence involves loving a thing by seeking to preserve or enhance its well being. Wolterstorff distinguishes love as benevolence conceptually because he wants to properly acknowledge that seeking to preserve or enhance an object’s well being may be done irrespective of any attachment or attraction.

The attachment of God to human beings, assuming it is the case, is similar to the queen's attachment to her friend. Not only does that love give human beings worth, it also gives them an enviable status. Those who should or would be envious, however, are not other human beings but "other creatures, if they knew about that love" (360).

A unique aspect of Wolterstorff's argument is that he explicitly considers what kind of conditions a basis for human dignity might meet. Though he names several, only three conditions are necessary. First, the basis "will be a property that all human beings have, though not necessarily by virtue of their nature" (321). Second, it "will be a property that no non-human animal has—more generally, that no non-human earthling has" (*ibid.*). Finally, it "will be a property that gives human beings non-instrumental worth" (*ibid.*). But Wolterstorff adds a qualification to this last condition. He contends that "[t]he non-instrumental worth that it [the basis] gives human beings will be greater than that which any animal has. No matter how far in the scale of excellence a human being may drop, she is still of greater excellence than any animal" (*ibid.*). This qualification suggests that dignity is not just worth but also excellence. Moreover, it suggests that the basis for dignity must be some kind of excellence, because what serves as the basis for excellence must itself be excellent in some way. It is with these necessary conditions in mind that Wolterstorff identifies God's love as the basis for human dignity. If God loves human beings, which Wolterstorff believes but poses as a hypothetical claim because of the theistic convictions upon which it rests, then he loves "each and every human being equally and permanently" (360). His love of human beings is not shared with nonhuman animals; and it must be excellent, or superb, because it is the kind of thing that gives humans a superior excellence.

James Griffin offers my second contemporary and final example of the excellence component. He also published an impressive book in 2008. The book attempts to help "complete the

incomplete notion” of human rights by making it more conceptually determinate. It is this incomplete historical notion that, according to Griffin, “is now so powerful in our political life” and “that many of us connect with the notion of the ‘dignity of the human person’, on some interpretation of that phrase. We see human rights as protections of that dignity” (Griffin 2008, 3). To make the idea of human rights more determinate, Griffin recommends that “we search for a satisfactory interpretation of ‘dignity’ in the phrase ‘the dignity of the human person’ . . .” (5). The satisfactory interpretation that he arrives at defines dignity straightforwardly as “a highly prized status” (152).

Griffin identifies “normative agency” as the basis for this extremely valuable status. Normative agency, like Cicero’s reason, Aquinas’ *imago Dei*, and Kant’s autonomy, involves high-level cognitive functions. Overall, it is “our capacity to choose and to pursue our conception of a worthwhile life” (45). Griffin breaks this down into three specific capacities, however. First is the capacity to choose the kind of life one wants to live. Second is the capacity to make a “real” choice, that is, an educated and informed choice (33). Finally, there is the capacity to actually pursue the life one chooses, that is, to “have at least the minimum provision of resources and capabilities that it takes” to actualize one’s choice (ibid.).

Though he does not use the language of excellence, Griffin seems to identify normative agency as human dignity’s basis precisely because it is a kind of excellence. More specifically, he seems to think of it as a superb quality. To see how he suggests this, we need to begin from a remark he makes about normative agency. In a discussion about the value of autonomy, Griffin claims that “[t]o adopt the personhood account of human rights is to adopt normative agency as the interpretation of ‘the dignity of the human person’ when that phrase is used of [*sic*] the ground of human rights . . . If normative agency is valuable, it is intrinsically valuable. One can only try to

make it sufficiently clear what normative agency is and expect others then to see that it is valuable” (152). Griffin certainly takes normative agency to be valuable. But valuable appears to have a particular meaning for him. This comes out in a general discussion about value judgments. What is telling is what he says in concluding the discussion. He states,

Deliberation about human interests ends up, I think, with a list of values. I am less concerned with precisely what is on the list than I am with the conclusion that deliberation ends with a general profile of values, *a chart of the various high points that human life can rise to*. My own list (no doubt incomplete) is this: accomplishments, enjoyment, deep personal relations, certain kinds of understanding, and—the interests that are most immediately relevant to human rights—the components of personhood. (115-16; emphasis added).

This conclusion reveals two important things. First, it reveals that Griffin thinks values are synonymous with “high points.” I think high points can be understood best as lofty goals. The second thing it reveals is that Griffin takes the components of personhood to be high points. If this is right, then it means that normative agency is a high point because the components of personhood are the components that make up normative agency (33). And if normative agency is a *high point*, then it is a kind of excellence, at least in the sense of being a superb characteristic.

In succinctly describing the historical accounts of human dignity by Cicero, Aquinas, and Kant, as well as the contemporary accounts of the concept by Wolterstorff and Griffin, I have tried to show that, despite human dignity’s ambiguity, a shared belief about how a justification for human dignity functions has been an important part of the concept’s tradition. Each one of these thinkers defines human dignity in a different way, even if only slightly; and each thinks, in one way or another, that human beings have or can be thought of as having dignity by virtue of some kind of excellence. This belief has been a constant undercurrent in thinking about human dignity for over two millennia.

### 3. The Problem of Human Dignity

An important implication of the excellence component is that it has helped to give human dignity some conceptual determinacy. Serious accounts of the concept have grounded and continue to ground dignity on some form of human excellence. Thus contrary to Bagaric and Allan, the concept is not vacuous and does have some boundaries, albeit extremely informal and poorly understood boundaries. But more important than this is the role the excellence component plays in a fundamental problem with the concept. The belief that a justification for human dignity functions when it characterizes humans as having some kind of excellence conflicts with claims that all or nearly all human beings have dignity. This conflict, however, is rooted in a more fundamental tension between excellence and universality (or quasi-universality) as normative criteria for a dignity-conferring property. Though theistic accounts can be susceptible to this tension, it is most acute among and troublesome for nontheistic accounts. The rest of this paper is devoted to showing how this problem operates. I think the best way to do this is to show that the “marginal cases problem” (MCP) and the unsuccessful attempts to resolve it in nontheistic terms are actually symptoms of the excellence/universality tension.

In the literature on human dignity, the MCP is taken to be a significant problem concerning the justification and scope of human dignity. The problem deals with the questions of whether and, if so, how to justify human dignity claims in a way that secures infants, those with dementia, and the profoundly mentally disabled within dignity’s scope. Since Cicero, conceptions of human dignity have excluded human beings from these groups. The exclusion arises because proponents have tended to ground dignity on some characteristic that involves a high level of cognitive function. The most common example of this is rationality. Consider Cicero’s account again. For him, human dignity is the worthiness human nature has by virtue of a human’s share in reason, that

is, by virtue of a human's awareness of temporality and causality, capacity to use causal logic, capacity to use foresight, capacity to understand and engage in justice, and capacity to understand natural law. Given that Cicero grounds human dignity in this way, important questions arise about who has dignity. Does a child with severe cerebral palsy (CP) who was never capable of any of the cognitive functions of reason share in dignity? Similarly, does an elderly person who has lost those cognitive functions retain the dignity of human nature? Do infants who apparently have the potential to exercise those cognitive functions but currently cannot have the dignity of human nature? It is not entirely clear how Cicero would answer these questions. Yet it seems that if one follows his account, one would have to say that the child with severe CP, the elderly person with dementia, and the yet to be rational infant do not have the worthiness of human nature. Similar questions and issues arise if one replaces reason with any other high-level cognitive function like free will, or autonomy, or the capacity for intentional creativity and destruction,<sup>17</sup> or the potential to form and define one's own identity,<sup>18</sup> or the capacity to achieve reasonable goals without interference from others,<sup>19</sup> or self-consciousness.<sup>20</sup> The consequence of grounding dignity on any of these bases is that the ascription of dignity to infants, those with dementia, and the profoundly mentally disabled is highly questionable at best and simply unjustifiable at worst.

The MCP was not noticeable in human dignity discourse prior to the twentieth century. Cicero, Aquinas, and Kant certainly did not pay any attention to it; neither did any of the other thinkers associated with the tradition such as Augustine, Giannozzo Manetti, Giovanni Pico della Mirandola, David Hume, Thomas Paine, and Mary Wollstonecraft. Not until animal ethicists began vigorously challenging conceptions of moral status in the late twentieth century did the MCP

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<sup>17</sup> Stanley, 1978, 69.

<sup>18</sup> Taylor 1994, 42.

<sup>19</sup> Ignatieff 2001, 57 and 164-65.

<sup>20</sup> Kohen 2007, 106.

become obvious and worthy of attention. Since then, people have generally taken one of two positions on the problem. Some have accepted, though often reluctantly, that marginal cases will just have to be outside the scope of human dignity. This is the position Griffin takes. He holds that “[n]ormal human adults have a kind of natural equality [and thus dignity]: they are all equally normative agents; they all cross the threshold into the class of such agents” (Griffin 2008, 83). “Human infants,” on the other hand, “are not normative agents. Neither are human fetuses, nor the severely mentally handicapped, nor sufferers from advanced dementia” (ibid.). Many people have refused to accept this kind of position. For them, human dignity’s scope either includes all human beings or is limited in such a way that, along with humans capable of exercising high-level cognitive functions, it still includes infants, those with dementia, and *many* people who are profoundly mentally disabled.

Attempts to justify one of these latter two positions are plentiful in the literature and generally fall into one of two categories. Many attempts are theistic. In fact, there has been a resurgence of interests in the concept of human dignity among theologians and scholars whose religious worldview deeply informs their work.<sup>21</sup> On the whole, these theistic responses have been effective solutions to the MCP. Consider Wolterstorff’s account again. Recall that he grounds human dignity on God’s love. This is a basis that plausibly applies to all human beings. Its plausibility stems largely from the fact that it is not related to any particular cognitive function; it is contingent simply upon being biologically human. What makes the alternative successful, however, is not simply its universality. God’s love also meets the condition of being an excellent characteristic. Assuming that God is as great as believers like Wolterstorff maintain, the idea that God is attached to humans, and only humans, in a special and loving way is an outstanding thing.

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<sup>21</sup> See, for example, Gormally 2002; Shultziner 2006; Soulen and Woodhead 2006; Perry 2007; Gelernter 2008; Aguas 2009.

The trouble with all of this, of course, is that to find it persuasive one has to hold Wolterstorff's theistic convictions about God's existence and greatness. Additionally, one must share the belief that God has a special preference for humanity. In our pluralistic world, these are convictions that many people simply do not and will not hold. So Wolterstorff's alternative, while successful in responding to the MCP, is really only successful from a theistic standpoint. From a nontheistic standpoint, God's love just won't do and the MCP still stands. These are problems that any theistic response must confront.

The other category of responses is nontheistic. These responses have not been as successful and their failures point to the excellence/universality tension. Let's closely examine three of the most developed accounts in this category. Patrick Lee and Robert George offer the first account; Martha Nussbaum presents the second; and the third response is from Eva Kittay. For each of these conceptions, I will clarify how each thinker defines human dignity, reconstruct their understanding of the MCP, reconstruct their response to their respective understanding of the MCP, and explain why each response is unsuccessful.

In an essay titled "The Nature and Basis of Human Dignity," Lee and George characterize human dignity as a "special type" of dignity (Lee and George 2008, 409). As they understand it, the general concept of dignity denotes respect-worthiness, for "[a]lthough there are different types of dignity, in each case the word refers to a property or properties—different ones in different circumstances—that cause one to excel, and thus elicit or merit respect from others" (410). What distinguishes *human* dignity is that it is "the dignity of a person" or "personal dignity" (ibid.). Personal dignity, accordingly, "is that whereby a person excels other beings, especially other animals, and merits respect or consideration from other persons" (ibid.). Four qualifications complicate this clear-cut definition. First, personal dignity is static; it does not vary in degree.

Second, Lee and George refer to personal dignity as “real,” by which they seem to mean objective. Thus they posit a distinction between one’s real dignity and one’s sense of that dignity. Third, personal dignity is inherent, that is, it is not ascribed to an individual by others but is something to be acknowledged by others as an essential aspect of a human being. Finally, and most important, personal dignity is synonymous with “full moral worth.” In general, to have moral worth in Lee and George’s theory is to be the kind of object that should receive respect or consideration from a moral agent. Having *full* moral worth, however, includes being the recipient of respect or consideration from a moral agent, as well as being a rights bearer, the recipient of actions guided by “the Golden Rule,” the kind of thing it would be absolutely wrong to kill if innocent of any wrongdoing, and the kind of thing it would be absolutely wrong to deprive of any basic intrinsic good if innocent of any wrongdoing (418). While all living beings have moral worth, only rational beings (and humans as rational beings) have full moral worth (ibid.).

The marginal cases problem, as Lee and George understand it, refers to the denial of personal dignity’s universality among human beings. Some thinkers, they argue, restrict the scope of personal dignity because they ground dignity on the “possession of certain characteristics in addition to [one’s] humanity” (409). Neither a full reconstruction nor a concrete illustration of this view is offered. Instead, Lee and George go on to refute the claim that nonhuman animals and/or other living beings have full moral worth because they have the capacity to experience enjoyment or suffering. Nonetheless, they do offer two hypothetical examples of characteristics that thinkers add to humanity as the basis for personal dignity: the “immediately exercisable capacity for self-consciousness” and the immediately exercisable capacity “for rational deliberation” (ibid.). What concerns Lee and George most about claims of non-universal personal dignity is what they believe such claims imply. Since they take personal dignity to be synonymous with full moral worth, Lee

and George think those who deny dignity's universality are also denying that all humans have full moral worth. The implication of this, for them, is that some humans, namely, "human embryos, fetuses, and severely retarded, demented or debilitated human beings," may be used, consumed, and destroyed by and for the benefit of others (411).

Lee and George argue against the claim of non-universal personal dignity and its implications by appealing to a philosophically essentialist view of human beings.<sup>22</sup> They contend that all humans, from the embryonic stage until death, have personal dignity because all have the rational nature upon which that dignity rests. This argument has two main parts. One is an explanation and defense of why rational nature is the basis for personal dignity. Rational nature is constituted by "the basic natural capacity for conceptual thought" and "the basic natural capacity or potentiality to deliberate among options and make free choices" (424). Understood this way, rational nature is a dignity-conferring property because it meets three normative criteria. The first criterion that it meets is that of being a nature or essence. According to Lee and George, a nature is suitable as a dignity-conferring property because it is invariable and essential to the thing that has it. The reason why a dignity-conferring property should not vary is that, if it does, two undesirable consequences follow in the case of human dignity: one, some humans may have the property to a lesser degree than nonhumans and thus the interests of some nonhumans may trump the interests of some humans; and two, some humans will have the property to a greater degree than others and thus not all humans will have equal dignity. An invariable property is supposed to avoid these outcomes. The reason why a dignity-conferring property should be essential is that such a property would best explain why moral agents actually show moral concern for persons. "We are aware," write Lee and

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<sup>22</sup> Philosophical essentialism is a metaphysical position which holds that objects have "essences," namely, certain properties that make them what they are. Those properties that form an object's essence are "essential" properties and are distinguished from "nonessential" or "accidental" properties, which an object may possess but could lack and retain its identity. For a more detailed explanation, see Robertson 2008.

George, “that persons themselves [and humans as persons]—the substantial entities they are—are intrinsically valuable. But if that is so, then it would make sense that what distinguishes those entities that have full moral worth (inherent dignity) from those that do not should be the type of substantial entity they are, rather than any accidental attribute they possess” (416). An “accidental attribute” is a characteristic that something has but could lack and still maintain its identity.<sup>23</sup> So the argument is that “we” moral agents simply don’t value persons for attributes that are not essential to their nature; as a result, whatever grounds personal dignity should be something that is essential to what persons are, something without which a person could not exist. That “something,” we are told, is a person’s rational nature.

The second criterion that rational nature meets is that of being a property that causes persons to excel. Remember that Lee and George define personal dignity as “that whereby a person excels other beings, especially other animals, and merits respect or consideration from other persons.” By definition, therefore, a dignity-conferring property for personal dignity should be something that accords with the excellence component. This is precisely what rational nature does; it causes human persons to surpass nonhuman animals in cognitive function. Lee and George contend, “because of the capacity for conceptual thought, human beings’ actions and consciousness are not restricted to the spatio-temporal present. Their awareness and concern go beyond what can be perceived or imagined as connected immediately with the present” (423). Furthermore, “because of the capacity for conceptual thought, human beings can reflect back upon themselves and their place in reality, that is, they can attain an objective view, and they can attempt to be objective in their assessments and choices. Other animals give no evidence at all of being able to do either of these things; on the contrary, they seem thoroughly tied to the here and now, and unable to take an objective view of

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<sup>23</sup> See note 21.

things as they are in themselves, or to attempt to do so” (ibid.). Though Lee and George do not compare humans and nonhuman animals in the same kind of detail regarding the capacity to deliberate and freely choose, they imply that that capacity also enables humans to excel. They do this by extolling what the capacity allows human beings to do (e.g., direct one’s will and assist nature and one’s social environment in the formation one’s character) and then claiming that “there is no evidence of . . . conceptual thought or free choice in other animals” (424n.\*).

The last criterion that rational nature meets is that it is fundamentally relevant to morality. Lee and George presume this criterion rather than make any case for it. The presumption rests on the fact that they view personal dignity as synonymous with full moral worth. For them, what is at stake in determining a dignity-conferring capacity is the condition for having full moral status, so whatever that capacity happens to be it should be something relevant to morality. To show that rational nature is relevant to morality, they contend that such a nature “*entails* that those who possess [it] must be respected as ends in themselves or as creatures having full moral worth” (425; emphasis added). They develop this argument using a perfectionist account of practical reason and start from the idea that rational agents act for reasons. Among those are “ultimate reasons,” or “intrinsic goods,” which are those “condition[s] or activit[ies]” that are “*really fulfilling* or *perfective* (of me and/or someone like me)” (426). Because intrinsic goods are perfective, they are “fitting object[s] of pursuit, that is, [they are those objects] that it would be worth pursuing” (ibid.). For rational agents, intrinsic goods are “the conditions to which we are naturally oriented and which objectively fulfill us, the various aspects of our fulfillment as human persons. They include such fulfillment as human life and health, speculative knowledge or understanding, aesthetic experience, friendship or personal community, and harmony among the different aspects of the self” (427). In Lee and George’s view, a rational agent’s pursuit of these intrinsic goods entails a demand on her

part “to appeal to the reason and freedom of others to respect that pursuit, and [her] real fulfillment” (428). The implicit assumption here is that the demand follows because the intrinsic goods are necessary and the agent could not achieve them if others failed to respect her pursuit of them. Another demand follows from this one. “[C]onsistency, that is, reasonableness,” Lee and George conclude, “demands that I also [should] respect the rational pursuits and real fulfillment of other rational agents” (ibid.). Here the implicit assumption is that if I think others should respect my pursuit and fulfillment as a person, then I should respect the pursuit and fulfillment of others as persons. None of this complicated argument, however, really gets at why rational nature is relevant to morality. What shows that relevance is what Lee and George leave in the background of what they say: the idea that morality is about fulfilling or perfecting a thing’s nature, and more fundamentally about perfecting a rational being’s nature. If it’s the case that morality is essentially about perfecting a rational nature, then just having a rational nature is relevant to morality and sufficient for having full moral worth.

The other part of Lee and George’s argument against claims of non-universal personal dignity is an explanation and defense of the claim that all humans have a rational nature. Simply put, their argument is that all humans have a rational nature because the capacity for conceptual thought and the capacity to deliberate and freely choose are essential aspects of a human’s genetic make up. They claim that all humans have these capacities “in virtue of the kind of entity they are. That is, from the time they come to be, they are developing themselves toward a mature stage at which they will (unless prevented from doing so by disability or circumstance) perform such acts. Moreover, they are structured—genetically, and in the nonmaterial aspect of themselves—in such a way that they are oriented toward maturing to this stage” (423). The “nonmaterial aspects” (i.e., nonphysical aspects) of which Lee and George speak are the capacities for conceptual thought,

deliberation and free choice. According to them, the fact that “the object of conceptual thought is not restricted to a particular space and time . . . is evidence that the power of conceptual thought is non-material” (424n.\*). And while their reasoning is not entirely clear, it is because the power of conceptual thought is nonmaterial that Lee and George “hold that human beings have a non-material aspect, the powers of conceptual thought and free choice” (ibid.). To be human in Lee and George’s sense, accordingly, is to be the kind of thing that has a genetic structure fundamentally constituted by nonphysical capacities for conceptual thought, deliberation and free choice.

Now given that, as I noted above, Lee and George hold that a dignity-conferring property must be invariable, it seems that they have contradicted themselves. How is it, one might ask, that rational nature can ground personal dignity when that nature is constituted by capacities that vary in degree? One might also ask how is it that all humans have a rational nature when rational nature is defined by capacities that not all humans seem to have? I will take up these questions in more detail below, but for the moment I want to note that Lee and George anticipate them. They respond by arguing that the “criterion for full moral worth and possession of basic rights is not *having* a capacity for conscious thought and choice, but *being* a certain kind of thing, that is, having a specific type of substantial nature. Thus, possession of full moral worth follows upon being a certain type of entity or substance, namely a substance with a rational nature, despite the fact that some persons (substances with a rational nature) have a greater intelligence, or are morally superior (exercise their power for free choice in an ethically more excellent way) than others” (429). Their response, then, is to posit a distinction between being a substance and having capacities. Yet the meaning of this distinction is unclear, for being a substance with a rational nature *is* to have the capacity for conceptual thought and the capacity to deliberate and freely choose. Indeed, Lee and George claim that “[a]ll human beings have th[ese] capacit[ies], so all human beings are persons”

(411). Given this definition of what it means to be a person, what Lee and George seem to be getting at is a distinction between having capacities and having capacities in an immediately exercisable way. If this is right, then their response to the first question is that simply having the capacities, not being able to exercise them, is the criterion for personal dignity, and all humans equally have the capacities. Likewise, their response to the second question is that while the degree to which one can exercise the capacities for conceptual thought, deliberation, and free choice may vary, all humans are genetically endowed with the capacities. So, for example, though the child with severe CP may appear to lack the rational capacities, she actually has them by virtue of the fact that she is biologically human; she simply cannot exercise them.

Overall, Lee and George's solution to the MCP is respectable; even so, it is ultimately unsuccessful. The problem concerns their claim that all humans have a rational nature. Depending on whether one takes a materialist or an immaterialist view of the capacities for conceptual thought, deliberation and free choice, Lee and George's claim is either wrong or extremely problematic. If one takes a materialist view of the capacities, as I do, then Lee and George's claim is simply untenable. To take a materialist view is to hold that the capacities that make up rational nature are located within the brain's cerebral cortex, specifically, the prefrontal cortex, and that determining whether one has the capacities is determined by the existence and condition of one's prefrontal cortex. "[T]he cerebral cortex," anatomist John Nolte writes, "has a critical role in the abilities and activities that reach their highest level of development in humans (or, in some cases, are unique to humans). Obvious examples are language and abstract thinking" (Nolte 2009, 542). Essential to the human capacity to perform certain abilities and activities in unique ways or at a high level of development is the prefrontal cortex, which "is centrally involved in controlling the activities of other cortical areas—to such an extent that it is seen as underlying the **executive functions** of the

brain: planning, insight, foresight, and many of the most basic aspects of personality” (567). To be sure, the prefrontal cortex is a typical trait in the human species. Be that as it may, some humans are born without it (e.g., anencephalic children); others lose the ability to exercise prefrontal cortical capacities due to neurological damage (e.g., people in a persistent vegetative state); others never had the ability to exercise prefrontal cortical capacities due to neurological damage, which is akin to not having them at all (e.g., some children with quadriplegic spastic CP). From a materialist perspective, insofar as the capacities that constitute rational nature are functions of the prefrontal cortex, and there are humans who fail that have or are incapable of properly exercising that part of the brain, Lee and George’s claim of rational nature’s universality among humans is mistaken.

But what if one takes Lee and George’s immaterialist view of the capacities? Is the problem avoided? Well, yes. If possession of the capacities cannot be reduced to the possession and condition of a certain aspect of the brain, then that opens up the possibility, however mysterious it may be, that even humans without the prefrontal cortex have the capacities. Yet this raises concerns not about whether all humans have the capacities but about whether they have them in a dignity-conferring way. The capacities are collectively dignity conferring as rational nature because they meet the normative criteria of being an essence, reflecting a kind of excellence, and being relevant to morality; but whether they always meet the second of these three criteria is doubtful. The capacities reflect excellence because of what they enable human beings to do: think beyond the spatio-temporal present, reflect and take objective stances on reality, create syntactical language, determine one’s will, assist in forming one’s identity, etc. However, as I just alluded, it is a fact that there are some human beings who have never had or have lost the ability to perform these actions. For the immaterialist, it does not follow from this fact that those humans do not have the capacities for conceptual thought, deliberation and free choice; what follows is that they simply cannot

exercise those capacities. If this is the case, though, then not all humans have the capacities in a dignity-conferring way because the capacities fail to do what they normatively should do to be dignity conferring, namely, cause a human being to excel other animals and merit respect and consideration from other persons. If one is incapable of performing the actions that the capacities engender, then one cannot excel other animals; and if one is incapable of performing the actions that merit respect and consideration, then one cannot be the object of the respect and consideration that those actions merit.

The inability of Lee and George to credibly uphold their claim that rational nature is universal reveals a tension between excellence and universality. Lee and George want a conception of rational nature that is both illustrative of human excellence and universal. As we've seen, however, they cannot have a conception that meets both criteria. On the one hand, they can maintain their immaterialist view of personhood. That allows them to speak of a universal rational nature but at the cost of having that nature fail to meet the excellence component in every instance. On the other hand, they can take a materialist view of personhood. That would give them a rational nature that is dignity conferring in every instance among those who have it because it meets the excellence component; but the scope of those who have it would not be coextensive with humankind. Neither of these options, it seems, is appealing to Lee and George: one gives you universality at the expense of excellence; the other gives you excellence at the expense of universality. We can see, then, that trying to bring all humans within the scope of dignity and meet the normative standard set by the excellence component by appealing to the idea of human nature is fraught with difficulties, for that nature must be something that all humans have without question and something that reflects human excellence without question. I now want to consider how similar difficulties appear in Martha Nussbaum's attempt to resolve the MCP.

Similar to Lee and George, in such recent works as *Frontiers of Justice* and “Human Dignity and Political Entitlements,” Nussbaum acknowledges and emphasizes that human dignity is one type of dignity among others. Unlike them, though, she does not offer a concise statement of how she understands the latter, more general concept. Nonetheless, her understanding can be concisely stated as follows: dignity is an “end-like worth” grounded on the possession, by “complex living and sentient beings,” of “basic capabilities” that are worthy of respect.<sup>24</sup> Let me unpack this. End-like worth encompasses three ideas: one, the Kantian idea that an individual is an “end” and not merely a means to be used by others; two, the idea that an individual can be the source of moral and political claims; and three, the idea that an individual falls within the class of beings that can be treated justly or unjustly. Having dignity, accordingly, means that one is an “end” that can make (or be thought of as having) moral and political claims that deserve attention. It also means that others’ attentiveness and responsiveness to one’s moral and political claims is a matter of justice. Nussbaum contends that ascription of these statuses of “end,” moral/political claimant and subject of justice should be restricted to beings with the capacity to experience pleasure and pain in various complicated ways, though she admits that she has “no very solid argument for this position” (HDPE 373). At least one reason why she takes this position is because she believes that complex sentient beings have “basic capabilities” that are worthy of respect. Basic capabilities are “untrained capacities” (undeveloped capacities) that complex living and sentient beings tend to have (357 and 365).<sup>25</sup> Each species has its own unique set of basic capabilities that “seek expression in a characteristic form of life” (365). Through this drive to express themselves, Nussbaum argues, “these capacities . . . inspire awe and should be objects of respect” (ibid.). Bringing this together in

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<sup>24</sup> The term “end-like worth” comes from Nussbaum 2008, which is Nussbaum’s most developed treatment of her conception of human dignity.

<sup>25</sup> Nussbaum distinguishes “basic capabilities” from “internal capabilities” (i.e., “trained capabilities”) and “combined capabilities” (i.e., “trained capabilities with suitable circumstances for their exercise”) (Nussbaum 2008, 357). Also see Nussbaum’s remarks on this distinction in *Women and Human Development* (Nussbaum 2000, 84).

the case of human beings, Nussbaum holds that human dignity is a moral worth that humans have by virtue of possessing some undeveloped yet awe-inspiring capacities.

As Nussbaum sees it, the exclusion of humans with “severe mental disabilities” from this dignity is the marginal cases problem. She is not particularly worried about embryos, fetuses, or infants. Her concern is with the mentally disabled, within which we can include persons with dementia. Exclusion of the mentally disabled occurs, according to Nussbaum, when the ascription of human dignity is based solely on the possession of one particular basic capability. She notes, for instance, that grounding dignity solely on the possession of the capacity to reason excludes many mentally disabled humans from dignity. But she cautions that if greater inclusion is sought by shifting to another capacity, “such as the capacity for social interaction or care, many human beings would still be excluded” (362). The significant consequence of this exclusion is that some humans, namely, humans with severe mental disabilities, would fail to be “ends,” sources of legitimate moral and political claims, and subjects of justice. This result follows because of how Nussbaum understands dignity and because human dignity is so central to her theory of social and global justice among humans. To be fully just, on her account, a society must guarantee that all citizens, because they have dignity, can live “a life worthy of human dignity” (Nussbaum 2006, 74). Guaranteeing this possibility means creating favorable conditions for the development and exercise of dignity-conferring capacities. An exclusion from the sphere of dignity, therefore, is tantamount to exclusion from a dignified and just life.

To avoid the risk and problem of exclusion, Nussbaum selects a wide range of dignity-conferring capacities and includes high-level, low-level, and noncognitive capacities within that range. She lists ten capacities overall; five are strictly high-level cognitive capacities: the capacity to

use one's senses thoughtfully;<sup>26</sup> the capacity to engage in practical reason;<sup>27</sup> the capacity to affiliate with others;<sup>28</sup> the capacity to live with members of other species;<sup>29</sup> and the capacity to have control over one's environment.<sup>30</sup> Two capacities are noncognitive: the capacity to live until natural death and the capacity to have bodily health.<sup>31</sup> The remaining three capacities are a combination of either high-level and low-level cognitive capacities or high-level and noncognitive capacities. The former includes the capacity to develop and experience emotions in complex ways and the capacity to play.<sup>32</sup> The latter includes the capacity to have bodily integrity.<sup>33</sup>

With this set of dignity-conferring capacities in place, Nussbaum goes on to argue “that full and equal human dignity is possessed by any child of human parents who has any of an open-ended disjunction of basic capabilities for major human life-activities” (Nussbaum 2008, 363). The key phrase here is “open-ended disjunction,” since it determines what having the basic capabilities amounts to. Disjunction refers to a logical disjunction or disjunctive proposition, that is, a

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<sup>26</sup> Nussbaum refers to this capability as “Senses, Imagination, and Thought” and defines it as the ability “to use the senses to imagine, think, and reason. . . . [The ability] to use imagination and thought in connection with experiencing and producing works and events of one's own choice. . . . [The ability] to use one's mind in ways protected by guarantees of freedom of expression . . . [And the ability] to have pleasurable experiences and . . . avoid non-beneficial pain” (2008, 377).

<sup>27</sup> Nussbaum refers to this capability as “Practical Reason” and defines it as the ability “to form a conception of the good and to engage in critical reflection about the planning of one's life” (2008, 378).

<sup>28</sup> Nussbaum refers to this capability as “Affiliation” and defines it as the ability “to live with and toward others, . . . recognize and show concern for other human beings, . . . engage in various forms of social interaction; . . . imagine the situation of another. . . . [The ability to have] the social bases of self-respect and non-humiliation; . . . [the ability] to be treated as a dignified being whose worth is equal to that of others” (2008, 378).

<sup>29</sup> Nussbaum refers to this capability as “Other Species” and defines it as the ability “to live with concern for and in relation to animals, plants, and the world of nature” (2008, 378).

<sup>30</sup> Nussbaum refers to this capability as “Control over one's Environment” and defines it as the ability “to participate effectively in political choices that govern one's life[,] . . . hold property[,] . . . [and] work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers” (2008, 378).

<sup>31</sup> Nussbaum refers to these capabilities, respectively, as “Life” and “Bodily Health.” She defines them, respectively, as the ability “to live to the end of a human life of normal length” and the ability “to have good health, including reproductive health; . . . be adequately nourished; . . . [and] have adequate shelter” (2008, 377).

<sup>32</sup> Nussbaum refers to these capabilities, respectively, as “Emotions” and “Play.” She defines them, respectively, as the ability “in general, to love, to grieve, to experience longing, gratitude, and justified anger” and the ability “to laugh, to play, to enjoy recreational activities” (2008, 377 and 378).

<sup>33</sup> Nussbaum refers to this capability as “Bodily Integrity” and defines it as the ability “to move freely from place to place; . . . be secure from violent assault; . . . [and have] opportunities for sexual satisfaction and for choice in matters of reproduction” (2008, 377).

compound sentence in which the coordinating conjunction “or” is the logical connective between or among the sentences. Commonly understood, disjunctions are binary and discussion of them concerns their truth-value: if at least one of the sentences (“disjuncts”) is true, then so is the disjunctive proposition.<sup>34</sup> Consider the following statement: “Vicky is writing her paper or practicing her clarinet.” For this disjunction to be true, Vicky must be writing her paper, or practicing her clarinet, or performing both actions. In the event that neither action is being performed, the disjunctive proposition is false. Because disjunctions are commonly understood as binary, Nussbaum appears to be using “open-ended” to signify a compound sentence composed of multiple and unlimited disjuncts. Expressed in propositional form, an open-ended disjunction would look something like this: “Vicky is writing her paper, or practicing her clarinet, or surfing the internet, or having lunch with Santiago, or . . .” Again, the disjunctive proposition is true if at least one of the disjuncts is true and false if all are false.

So what does all of this talk of disjunctions mean for Nussbaum’s statement and theory of equal human dignity? It means that, on her account, the possession of equal dignity is dependent upon the truth-value of a particular open-ended disjunctive proposition. The proposition includes every capacity on her capabilities list and could include more, since Nussbaum is open to revising or expanding the list. Each capacity is the direct object of a single declarative sentence; and each sentence can be combined by the conjunction “or” to form a very long compound sentence. Using X to indicate any child of human parents, Nussbaum’s disjunction would read: “X has the capacity to use her/his senses thoughtfully, or the capacity for practical reason, or the capacity to affiliate with others, or the capacity to live with other species, or the capacity to have control over her/his environment, or the capacity to live until natural death, or the capacity to have bodily health, or the

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<sup>34</sup> For a fuller explanation of disjunction, see Jennings and Hartline (2001).

capacity develop and experience emotions, or the capacity to play, or the capacity to have bodily integrity, or . . .” Only one of these disjuncts has to be true to make the proposition true; and insofar as the proposition is true, it is also true that the individual in question has equal human dignity. Ultimately, then, by using the language of disjunction Nussbaum is arguing that a human only needs to have at least one of the basic capabilities on her list to qualify as a bearer of equal dignity.

This is an impressive solution to a version of the MCP; nonetheless, as in Lee and George’s case, it is also unsuccessful. The problem, however, does not concern universality; at least not in the same way that universality is a problem for Lee and George. Nussbaum does not hold that all humans have dignity. “We would not accord equal human dignity,” she argues, “to a person in a persistent vegetative state, or an anencephalic child, since it would appear that there is no striving there, no reaching out for functioning” (363). Hence those humans who should be accorded dignity are those who are neocortically living.<sup>35</sup> This position, in conjunction with her strategy of having a broad range of dignity-conferring capacities, casts aside concerns that could arise about whether Nussbaum shows that the scope of equal human dignity is coextensive with humankind in that term’s biological sense. With that said, Nussbaum is committed to the claim that the scope of equal human dignity is coextensive with the scope of those neocortically living humans who have at least one basic capability. This is the claim that I find troubling and mistaken. The trouble is that several of the basic capabilities identified by Nussbaum do not seem to be dignity conferring on her own terms. Consequently, contrary to Nussbaum’s claim, the scope of equal human dignity and the

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<sup>35</sup> I use the term “neocortically living” as an antonym for “brain death” and what some in the health care field call “neocortical death.” “Neocortical death” refers to a permanent loss of consciousness. People who are neocortically dead “are in either an irreversible coma or an irreversible vegetative state” but are not brain dead “because at least some of the brain stem continues to function” (Devetterre 2010, 143). Though the concept of neocortical death is contentious and not yet an accepted neurological criterion for death, I think “neocortically living” best captures who Nussbaum has in mind when she limits dignity to those who present some kind of “striving.”

scope of those who are neocortically living and possess at least one basic capability do not seem to be coextensive. Instead, the former scope seems significantly smaller than Nussbaum desires.

To be dignity conferring, Nussbaum suggests, a capacity should meet two normative criteria: one, it should be respect worthy by virtue of being wonderful and intrinsically valuable (Nussbaum 2006, 93-94; 2008, 365); and two, it should be a prerequisite for living any kind of flourishing life (Nussbaum 2008, 357-58). My concern is with the first criterion, because it reveals a tacit acceptance of the excellence component. Nussbaum is well aware of the human dignity tradition. She offers her conception as an “Aristotelian view” within that tradition and as a contrast to what she calls “the influential Stoic account.” The contrast between her view and the Stoic account is not complete, however. There are ideas that she adopts from the Stoics. One that she tacitly adopts is the excellence component. As I have shown, beginning with the first known textual instance of the concept of human dignity, the excellence component has long been a normative criterion for judging the suitability of a basis for dignity. The presence of this criterion is reflected in Nussbaum’s reconstruction of the Stoic account. She writes,

Reason (meaning practical reason, the capacity for moral choice), is, in the Stoic view, a portion of the divine in each of us . . . Moral capacity is wonderful and worthy, so it ought to be respected. People usually give reverence and awe to the outward trappings of wealth and power. Instead, the Stoics argue, we should respect what is really worthy in us. (352).

Nussbaum embraces this idea that what gives humans dignity is something “wonderful” and “worthy” and thus worthy of respect. Indeed, her Aristotelian alternative is intended to show that more human capacities than reason suit the idea.

But I am unconvinced that she is successful in accomplishing this because I am skeptical about whether each of the basic capabilities taken by itself is “wonderful” and “worthy.” Since Nussbaum links wonder and its grammatical forms with awe and its grammatical forms, and appears to use the terms interchangeably, I take her use of “wonderful” to mean, as the *OED*

suggests, “such as to excite wonder and astonishment.”<sup>36</sup> And since she appears to use “end-like worth” and “infinite worth” interchangeably with worthy, I take her use of “worthy” to mean intrinsically and greatly valuable. The concern, then, is whether each capacity is wonderful and worthy in the sense of being such that it excites wonder and astonishment and is intrinsically valuable. I don’t think each is. At least six of the ten capacities do not seem wonderful: the capacity to live until natural death, the capacity to have bodily health, the capacity to have bodily integrity, the capacity to develop and experience emotions, the capacity to play, and the capacity to live with members of other species. None of these, as Nussbaum describes them, come across as inspiring astonishment. Take, for example, the capacity to develop and experience emotions. Being able to love, grieve, experience longing, gratitude and justified anger may be a desirable capacity and even necessary for a flourishing life, but it is not amazing. It does not give the impression of being extraordinary. I think this is the case with the other five capacities just listed: while they may be desirable and even necessary for a flourishing life, they are not amazing or awe-inspiring.

The upshot of this is twofold. First, it means that the scope of human dignity is not coextensive with the scope of those neocortically living humans who have at least one basic capability. Since there appear to be basic capacities that are not dignity conferring, full and equal human dignity is, in principle, *not* possessed by any human child who possesses an open-ended disjunction of basic capabilities. The second, and more interesting, upshot is that among those humans who are left outside of dignity’s scope is a range of individuals with severe mental disabilities, precisely the group Nussbaum wants within the scope. Considering what the four remaining basic capabilities involve, they seem to be capacities that a large number of severely mentally disabled humans lack. Think, again, of the child with severe CP, or of individuals with

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<sup>36</sup> *Oxford English Dictionary*, 2<sup>nd</sup> ed., s.v. “wonderful.”

Alzheimer's disease (AD), which neuropathologists James Morris and Zsuzsanna Nagy tell us "is . . . overwhelmingly the most important factor in what has been called the silent epidemic of dementia that is occurring in societies with ageing populations" (Morris and Nagy 2004, 161). Children with quadriplegic spastic CP and those individuals with AD who develop severe dementia, especially when it includes prosopagnosia,<sup>37</sup> do not exhibit the capacity to use their senses thoughtfully, or engage in practical reason, or have control over their environment, or affiliate with others (in Nussbaum's sense).<sup>38</sup> All of these capacities as described by Nussbaum require a high level of cognitive function, which leaves us with bases for dignity that regenerate the marginal cases problem.

By expanding the number of dignity-conferring capacities, then, Nussbaum does not resolve the issue. To be sure, her account is an improvement on standard conceptions that rest human dignity solely on the capacity to reason. Identifying the capacity to use the senses thoughtfully and the capacity to affiliate with others as grounds for the ascription of dignity opens the door for the inclusion of many mentally disabled humans. Nonetheless, Nussbaum's strategy doesn't quite open the door wide enough. At the root of this shortcoming is the tension between excellence and universality as normative criteria for a dignity-conferring property. Nussbaum wants her list of capabilities to be both universal among neocortically living humans and illustrative of various types of human excellence, or in her terms, human wonderfulness. I have tried to show, however, that while some of her capacities can be persuasively thought of as wonderful, the majority of them

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<sup>37</sup> The inability to recognize faces.

<sup>38</sup> Studies suggest that damage to the white matter tracts, which connect the prefrontal region of the brain with other regions, impairs the executive functions of children with CP (Christ, White, and Brunstrom 2003). For other studies on the cognitive abilities and impairments of children with CP, see White and Christ 2005; and Straub and Obrzut 2009. Studies show that dementia of the Alzheimer's type (DAT) involves significant degeneration of the neocortex, particularly the temporal lobe, parietal lobe, and frontal lobe (Morris and Nagy 2004, 166-174). For a concise explanation of different stages of DAT, see Förstl and Kurz 1999.

cannot. At best, most of the capacities are more persuasively thought of as desirable and necessary to living a flourishing life. So in adopting the excellence component, Nussbaum adopts a high and demanding normative standard that many of her proposed capacities, which she needs to attain her desired universality, simply have trouble meeting. But what if we shifted not simply from one to numerous capacities, as Nussbaum does, but away from capacities altogether as the basis for human dignity? Could such a move meet the excellence and universality criteria? Next I shall examine how Eva Kittay makes this move.

Kittay's understanding of human dignity is highly influenced by what she calls the "equal dignity view." She distinguishes this view from the "group dignity view" and claims that the former has been dominant "[a]t least since the enlightenment" (Kittay 2005, 101). Both views define dignity as worth. Group dignity, however, is the worth a collection of objects may have *as* a group. What gives the group dignity may not be possessed by all members and thus "individuals in the group may be more or less entitled" to the group's dignity (100). Equal dignity, on the other hand, is a worth that is intrinsic and equal among every individual object that has it. In the case of human beings, this means that dignity "inheres in each and every human being to the same degree" (ibid.). Moreover, equal dignity is equally owed to each individual object that meets the criterion for having it. Broadly speaking, both types of dignity are grounded on the possession of some attribute. Regarding group dignity, whether every individual object has the dignity-conferring attribute is of little importance; it is sufficient if only some do. But with equal dignity, possession matters. Every individual object that has equal dignity must possess the dignity-conferring attribute to an equal degree. Importantly, Kittay adds a final element to equal dignity. She asserts that it must be "performance invariant,"<sup>39</sup> that is, it must be unalterable by the actions of those who have it.

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<sup>39</sup> Kittay borrows this term from D.A. Lloyd Thomas, "Equality Within the Limits of Reason Alone" (1979).

Though Kittay adopts the equal dignity view, she rejects traditional conceptions of it because they produce a marginal cases problem. Traditional conceptions, she argues, usually select a capacity or set of capacities as the dignity-conferring attribute; and they most often select “the capacity for reason and rational choice” (99). In selecting these cognitive capacities, traditional conceptions exclude various humans from dignity’s scope. They do not exclude all who could possibly be excluded, however. Another general characteristic of traditional conceptions is that they have made exceptions to the rule that one must possess the dignity-conferring attribute to have equal dignity. Infants are one exception. Dignity is extended to them because they have the cognitive capacities *in potentia*. The other exception comprises those “who once possessed [the capacities], but have now lost them—elderly persons with dementia or accident victims in a coma, for instance” (101). The group that has not been exempt in traditional conceptions is humans with severe cognitive disabilities, for they “never will and never have had these capacities” (102). But each individual in this group, like any other human, Kittay argues, is owed equal dignity. The question she seeks to answer, therefore, is the following: on what grounds should all humans without exception be accorded equal dignity?

The answer she proposes is relationships of care. The development of this answer, however, begins from the claim that “we find the ultimate source of our dignity . . . in a distinctly moral capacity to care” (111). The purpose of this starting point is to show that the capacity to care meets a normative criterion that any basis for human dignity should meet. Kittay, who claims to be following previous philosophers on this point, maintains that an appropriate basis for human dignity is something that allows human beings to engage in moral relations with one another (*ibid.*). It turns out, though, that this means a basis should be relevant to moral life and, more importantly, “distinctly human.” To show that the capacity to care is distinctly human, Kittay compares how

humans and nonhuman animals exhibit the capacity. This is a telling move, because it reveals a tacit acknowledgement of the excellence component. Kittay argues that “[i]t is not only the case that few, if any, creatures lavish care on the young that humans do. It is also the case that no other creatures devote themselves to the care of the ill, the disabled and the frail elderly that humans do *as a matter of course*” (112). Moreover, “[w]hile certain other species do exhibit a degree of caring for injured fellow creatures, the system of care almost all human cultures have developed far exceeds anything else found in the rest of the natural world” (ibid.). Thus while nonhuman animals may exhibit a capacity to care for one another, humans exhibit that capacity to a superior degree. As a result, that capacity is “as characteristically human and *as worthy of human dignity* as moral autonomy, self-creation, or the ability to enter into contracts of reciprocal social cooperation” (ibid.).

From here, Kittay proceeds to contend that the capacity to care establishes relationships that “serve as conduits of worth” (117). A relationship of care includes a caregiver, namely, “a woman (or man) who devotes herself (or himself) to, or takes responsibility for, the care of a dependent and vulnerable other, and who sees that other’s well-being as central and enmeshed with her or his own,” and a recipient, namely, one who is dependent and vulnerable (114). As Kittay defines it, and as many may assume, the act of caring for another is not an undemanding matter; it entails “the asymmetrical, non-reciprocal, and partial devotion to another’s well-being” (111). Devoting oneself in such a way involves “subordinat[ing] and defer[ing] one’s own direct interests, wishes, desires and mak[ing] oneself an affordance [i.e., a visible means] for the fulfillment of the needs of another” (115). These connections function as mediums of worth in two ways. Through caring for another, a caregiver confers worth on the recipient. Additionally, through the same act, a caregiver acknowledges and thus actualizes a worth that was already present, for “one gives care because of its intrinsic worth — and the only thing worthy of such efforts is another who in and of her/himself

has intrinsic value” (115). Since human dependency and frailty are essential aspects of the human condition, and all “infants who receive no care die very shortly after birth,” Kittay concludes that all humans who survive infancy and beyond have been and will at various times be recipients of care (114). Thus each and every human has the equal dignity that the care of another both confers and acknowledges.

At least this is what Kittay thinks. I contend, however, that her solution, like Lee and George’s and Nussbaum’s, is unavailing. Setting aside the fact that Kittay ultimately grounds dignity on the capacity to care, which would restrict dignity to those who have that capacity, and the fact that she speaks of a latent dignity, which further raises rather than settles questions about dignity’s basis, there are three problems that make her solution an inadequate response to the MCP. All three problems concern the idea of “relationships of care.” One is that such relationships are not universal among human beings. Care is a loaded concept in Kittay’s theory. Again, to care for a recipient is not simply to provide for or look after that person in just any way; more exactly, it requires strongly devoting oneself to the recipient’s well-being. Sadly, this is a form of care not received by many humans who survive infancy. Think about the scores of children who are victims of abuse and neglect. According to the latest Child Maltreatment report released by the United States Children’s Bureau, 745,962 children were victims of maltreatment<sup>40</sup> in 2008 (US Department of Health and Human Services, Administration for Children and Families 2010, 41). Of this total, 91,652 were less than one year of age (ibid.). And of the 1,344 children who died as a result of maltreatment, 609 were less than one year of age (61). Presumably, those infants who were not fatally maltreated survived because they received some care. Yet surely they did not receive care in

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<sup>40</sup> “Types of maltreatment include physical abuse, neglect or deprivation of necessities, medical neglect, sexual abuse, psychological or emotional maltreatment and other forms included in State law” (US Department of Health and Human Services, Administration for Children and Families 2010, 112).

Kittay's sense. Their caregivers were not devoted to their well-being and the fulfillment of their needs.

Another problem with relationships of care is that they fail to meet the normative condition of being distinctly human. Recall that Kittay believes that the *capacity* to care is appropriate as a basis for human dignity because it meets this condition. A *relationship* of care also meets it, but not because it emerges from the capacity to care. Its adequacy, rather, stems from the belief that "this relationship is ubiquitous in human society and is as fundamental to our humanity and our dignity as any property philosophers have invoked as distinctly human, and thereby the basis of a distinctly human dignity" (Kittay 116). While relationships of care may be ubiquitous and fundamental to the human condition, they are not distinctly human. Obviously other animals devote themselves to the welfare of their offspring. More interestingly, other animals devote themselves to the welfare of offspring that is not their own. Instances of this are exhibited in what scholars who study animal behavior refer to as "alloparental care." "An alloparent," Marianne Riedman writes, "is an individual, other than the genetic parent, that provides care for conspecific young" (Riedman 1982, 405). Practices of alloparenting vary with species and range from assisted care while a genetic parent is present to temporary care while a genetic parent is momentarily absent to "the actual adoption of another individual's young, especially in the absence of one or both of the original parents of the young" (ibid.). In addition to alloparenting, other animals engage in relationships of care through "succorant behavior." Succorant behavior is a form of "epimeletic behavior" (i.e., caregiving) that involves "care or attention by adults to distressed adults" (Caldwell and Caldwell 1966, 756). Most animals do not participate in this kind of behavior at all, but a considerable number do, particularly cetaceans. At least since Aristotle, there have been accounts of different

species of dolphins exhibiting succorant behavior.<sup>41</sup> Perhaps the most widely reported example is of dolphins lifting distressed or deceased conspecifics to the ocean's surface.<sup>42</sup> In the case of distressed dolphins, this is thought to be done in an effort to assist them in breathing. Now Kittay might defend her position by accepting the facts of alloparental care and succorant behavior but emphasizing her claim that human *systems* of care surpass those of nonhuman animals. I am certainly inclined to agree with this point. However, if that is what she wants to say, then she should abandon the language of a "distinctly human" property and speak more directly of a property that humans exercise better than other beings. She should also substitute human systems of care for "relationships of care."

Still another problem with the argument about relationships of care is that it paradoxically extends equal dignity beyond human beings. In agreement with Nussbaum, Kittay supports "the view that non-human animals and other living beings can also be said to have dignity" (Kittay 112). The dignity of nonhuman living beings, though, is group dignity, not equal dignity. Kittay implicitly reserves equal dignity for human beings. Yet her argument belies this reservation. Let us assume with Kittay that through caring a caregiver confers and acknowledges a recipient's dignity. Given that human caregivers devote themselves to the welfare of various kinds of recipients, equal dignity applies to more than human beings. Among the things that humans earnestly care for are different animals, like the family dog or cat. According to the argument's logic, then, those animals that receive human care are conferred equal dignity and must have a latent dignity that is actualized through the receipt of care.

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<sup>41</sup> In *History of Animals*, Aristotle notes the "gentle and kindly nature" of dolphins by recounting two stories: one in which a shoal of dolphins entered a harbor and refused to leave until one of their wounded and captured conspecifics was released; and another in which two members of a shoal supported the body of a deceased member in an effort to keep it from being "devoured by some predaceous fish" (Aristotle 199-?, 381).

<sup>42</sup> See, for example, Siebenaler and Caldwell 1956; Brown and Norris 1956; Caldwell and Caldwell 1966; Lodi 1992; Ritter 2007; Moura, Silva Rodrigues, and Siciliano 2008.

Collectively, the problems with Kittay's proposed resolution to her interpretation of the MCP give us reasons to reject that proposal. In trying to encompass all humans within the scope of equal dignity, Kittay fails to identify a universal property. The failure is not due the idea that all humans who survive infancy must have received care; it is due to the mistaken idea that all humans who survive infancy must have received care as Kittay conceptualizes it. Kittay also fails in her efforts to identify an excellent property, or in her words, a distinctly human property. Impressive relationships of care are found throughout the animal world. Mothers and fathers of various species make great sacrifices so that the needs of their young may be met. And though care for the ill and disabled is common among our own species, it is not unique to it. Other issues weaken Kittay's account, but these two are most important because they round out the problems that nontheistic accounts of human dignity face in attempting to resolve the MCP in a way that satisfies both the excellence and universality criteria. The primary problem with Lee and George's solution, recall, is that, if we take the materialist viewpoint, it fails to identify a property that is universal; however, it does a decent job of identifying a property that exemplifies human excellence. The primary problem with Nussbaum's solution, on the other hand, is that, while it does a decent job of identifying properties that are universal (among neocortically living humans), it fails to identify properties that persuasively exemplify human excellence. Kittay is somewhere between these two extremes. She has problems with both universality and excellence: relationships of care are neither universal nor excellent, or in her words, distinctly human. Given that these are the best nontheistic attempts to deal with the MCP, the prospect of resolving the problem in nontheistic terms appears hopeless.

#### 4. Conclusion

I began this paper with some remarks about the work human dignity is used to do in human rights discourse. I noted that it is used as a conceptual lens for thinking about human equality, as an ethical guide that tells us the purpose of human rights, and as a basis that tells us why human beings have human rights. The unresolved tension between excellence and universality bears heavily on the question of whether human dignity can adequately do this work. As I hope to have shown, a successful nontheistic defense of the claim that all or nearly all humans have dignity has yet to emerge. At the root of this failure is an inability to identify a dignity-conferring property that illustrates human excellence and is shared by all human beings. At best, nontheistic conceptions can defend the claim that humans capable of high-level cognitive functions have dignity. Upholding this claim, however, comes at a significant price. Restricting the scope of dignity to those humans capable of high-level cognitive functions restricts the scope of those humans who are fundamentally equal, have the thing that human rights protect, and have the thing that justifies thinking of an individual as a human rights holder. Whether this is a problem depends on whether one thinks marginal cases should be human rights holders. If, like James Griffin, one believes that the sole purpose of human rights is to protect the dignity of human agency, then it is likely that one will think that marginal cases who cannot act purposefully should not hold human rights and that the abovementioned restrictions are not problems. Yet I think this misses the intuitive and defensible purpose of human rights: to protect humans as agents *and* as patients. Because I think a certain kind of patienthood is as important to human rights as agency, I think many marginal cases can be human rights holders. This makes the problem of human dignity generated by the excellence/universality tension worth addressing.

There are at least three ways to proceed from here. First, one might try to resolve the tension between excellence and universality by continuing to search for some property (or set of properties) that satisfies both normative criteria. To be clear, I have not argued that in principle nothing can satisfy the normative criteria of excellence and universality (or near universality). The argument has been that, due to the marginal cases problem and thoughtful but unsuccessful attempts to solve it, these criteria appear to be at odds and there does not seem to be any promising solution to the conflict. One could therefore build on Lee and George's theory by reconceptualizing their notion of human nature. Or one could follow in the footsteps of Nussbaum by emphasizing the need for a broad range of dignity-conferring capacities. Or one could take up Kittay's strategy, not necessarily by focusing on relationships of care but by looking at other kinds of human relationships. However, I think travel down any of these conceptual pathways will be unproductive. The first path is fraught by the question of whether exercising nature, or putting nature into play, is important. The capacity to reason is crucial to Lee and George's idea of human nature, just as I think it would be in any such idea. While I can envision a way around the objection that not all humans have the capacity, I cannot envision how one can make a persuasive case for the excellent quality of that capacity without reference to its exercise, of which certainly not all humans are capable. The second path is fraught by the demand of excellence. One could search for capacities other than those identified by Nussbaum. The challenge in this is finding capacities that, one, do not involve a high level of cognitive function and, two, can still be convincingly thought of as exemplifying excellence. The third path is fraught by the demands of excellence and universality. Perhaps my thinking is too narrow, but I cannot conceive of any human relationship that could meet both conditions.

Another way of addressing the human dignity problem is by sidestepping the tension while at the same time retaining the language of human dignity. This could be done by arguing against the

use, either explicit or implicit, of excellence as a normative criterion for a dignity-conferring property. Such an argument, however, would be costly. Excellence, as I have tried to show, is what has given dignity its rich and unique meaning; moreover, aside from use of the term dignity, it is the only other thing that has been common and consistent in the tradition. Essentially, excellence is what has given dignity conceptual boundaries and force. An attempt to break the link between dignity and excellence, then, would amount to an attempt to get rid of what gives dignity much of its of conceptual determinacy. To be sure, one could and probably would propose some other normative criterion as a replacement. But unless the proposed criterion were widely accepted, human dignity would be awash in ambiguity, making it a more legitimate target for critics like Bagaric and Allan.

A third option, which I prefer, is to sidestep the problem by abandoning the concept of human dignity. Doing this, of course, means that one has to have different and perhaps new answers to the basic theoretical questions of how human rights supporters should understand equal human moral status and the purpose and basis of human rights. Notice that I say answers, not answer. Part of what makes the problem of human dignity such a problem is that the concept is asked to serve as a single response to a series of important questions. But perhaps these questions require different *and* separate answers. Indeed, the answers may be and probably will be interrelated, but they will not be reducible to a single response. It is not entirely clear how this theoretical work might be successfully completed. What is clear, however, is that there is work to be done.

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