

FOREWORD

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Normally, when you hear an “animal advocate” speak it is about one of two topics, either about the humane treatment of animals or about animal rights. The humane treatment of animals is a topic that has a lengthy history in this country. The work of some of the largest animal advocacy groups in the world, like the Humane Society, largely falls under this umbrella. Over the past half-century or so, the fight to criminalize or otherwise make illegal various forms of animal abuse—whether against domestic pets, farm animals, or animals used for commercial gain—has seen some success in the United States, starting with the federal Animal Welfare Act and trickling down to various state and local laws across the nation.

Some of us distinguish, however, between advocating for humane treatment and advocating for animal rights. Animal rights advocates often start with the premise that animals, like humans, have autonomy. Accordingly, to protect this autonomy, animals should be given some of the legal protections and privileges normally associated with humans. For example, personhood, perhaps starting with non-human primates and cetaceans, has long been seen as the ultimate goal of animal rights activists. This has been the life work of the animal rights lawyer Steve Wise and others. Another example would be the right for an animal to protect its interests in the courtroom, perhaps through some human guardian *ad litem*. We have seen in recent years conceived lawsuits to seek compensation on the behalf of animals held for entertainment, or most recently, the idea of suing an animal’s captor for libel when the public is told the animal is enjoying his captive home. Still others have stressed the need for direct legislative action—often at the state level—that would give animals statutory rights to protect their autonomy and freedom.

Some animal rights activists and scholars are not fully convinced that arguing that some animals have autonomy (which often sounds short-hand for intelligence) and, therefore, should extend to specific rights, is the best path forward. For example, Martha Nussbaum has stat-

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ed that as used in the animal rights context, the term autonomy has not been well defined and ignores that the concept of autonomy has many different meanings depending on the philosophical approach one chooses to consider or apply. Martha has suggested that animal rights activists should focus less on the vague concept of autonomy and instead focus on species-specific, central capacities: life, bodily health, bodily integrity, play, sense/imagination/thought, emotion, practical reason, affiliation, and control over one's environment.

More practically, one of the problems that has confronted Steve, for example, is that judges have demanded he show more than autonomy as a basis for granting primates the legal status of personhood; the judges also demanded that he demonstrate that primates could take an active role in fulfilling the "rights and duties" of citizenship within a society. Apparently this means voting, paying taxes, holding down a job, and otherwise not being a burden to the rest of society.

Thus, what is intriguing about Martha's approach is the ability to now argue that fulfilling "rights and duties" of citizenship is not the proper basis for determining personhood; instead, it is the ability of an animal to lead a meaningful life and even enrich the lives of other animals around her.

It is also exciting that science is rapidly proving that Martha is right regarding the capabilities of animals. We are truly in a revolutionary time with respect to scientific analysis of the cognitive, emotional, and social lives of so many animals. When I first entered the field of wildlife conservation in the 1990s, the fields of wildlife biology, conservation, and ecology focused almost exclusively on the physical needs of a species. In other words, the focus was largely on what essential habitat conditions a group of animals need to survive and reproduce. Today, scientists are fascinated with the knowledge that animals feel emotions, connect socially, and have points of view based upon their interactions with the world around them. Moreover, the work of Dr. Marc Bekoff and others in the field of compassionate conservationism has helped document the vast amount of research into animal feelings that has exploded over the past couple decades.

The problem for animal rights activists, however, is that rational thinking and sound science does not necessarily translate into legal protections and principles. If you did not already know this, you certainly do today as a result of the current policy direction of our nation on so many issues as a result of last year's presidential election. The reason for this—at least in my mind—is that, in a democratic society, law and policy often reflect a mixture of human emotions, which can be influenced by secular philosophy and science, but are also shaped by a collection of individual beliefs, biases, prejudices, and other basic fears, such as feeling that one's own place in the world is threatened. Collectively, these

emotions help form basic social norms that help hold us together and, more importantly, provide the basis for new legal rights and obligations.

Of course, history shows us that social norms are not always stagnant. They can both evolve and devolve. That is a subject that can be, and has been, explored in great depth elsewhere. For our purposes here, I merely wish to make a suggestion as to how social norms often do in fact change—namely through deliberation. I believe that our society, basic constitutional structure, established political institutions, and even some existing laws are designed to promote deliberation as a means of establishing new legal rights and protections. Of course, the system also ensures that deliberation is often painfully slow, which is a major contributor to some of the reasons our democracy has proven, so far, inadequate in protecting the rights of so many beings. I would be the first to argue that as a society we need to do a better job of deliberating and figure out methods to speed the process up.

Still, I believe that deliberation is the only proven means in our society to ensure lasting, and hopefully better, legal protections for humans, non-human animals, and even the environment. Which leads me to our approach to animals' rights at Friends of Animals.

Simply put, through our work we seek to convince, or even force, governmental decision-makers to incorporate the whole body of knowledge regarding an animal's well-being before undertaking any human-initiated action that could impact that animal. Despite the capabilities approach discussed by Martha, and despite this vast, ever-growing body of knowledge we can call compassionate conservationism, legal protections for animals still focus almost exclusively on physical suffering, death, or loss of elements essential to an animal's ability to survive.

What we are trying to establish is what Friends of Animals calls a "right to ethical consideration." This right is not the granting of specific substantive rights to animals, like the right to life or freedom. We fully support the granting of such individual rights to animals in many cases. Again, such rights are currently not part of our common social norm and are not embodied in most human legal systems. On the other hand, there is already philosophical, scientific, and I would also argue, legal tools available to us to make a strong case—whether before legislatures, administrators, or judges—to implement a right to ethical consideration in many jurisdictions.

Establishing a right to ethical consideration is a pathway to strengthening legal protections for animals. By requiring decision makers and others to maintain a dialogue—a deliberation—about the human impact on animal well-being, it is possible that societal and legal norms regarding the rights of other animals will gradually change.

WORKING WITH AND FOR ANIMALS: GETTING THE THEORETICAL FRAMEWORK RIGHT

MARTHA C. NUSSBAUM[†]

Friends of animals have lots to complain about and lots of work to do. To the familiar list of horrors—torture of animals in the meat industry, misery inflicted on puppies by puppy mills, the damages of research using animals, the manifold harms endemic to the confinement of apes and elephants in zoos, we have some further issues that have only become issues in the past few decades: depletion of whale stocks by harpooning, the confinement of orcas and dolphins in marine theme parks, the poaching of elephants and rhinos for the international black market, the illicit trafficking of elephants from Africa into U.S. zoos, the devastation of habitat for many large mammals through climate change.¹ New issues arise all the time. The world needs an ethical revolution, a consciousness raising movement of truly international proportions.

But bad behavior also needs law. No major crimes against sentient beings have been curbed by ethics alone, without the coercive force of law—although it typically takes an ethical movement to goad law into action. And so far, both in the U.S. and in the international community, law has been lagging behind the evolving ethical consciousness of humanity. Animals still lack standing under both U.S. and international law. They also lack any rights of ethical consideration.² All human animals are treated as persons and ends (no matter how immature the human is), but all non-human animals are treated as mere things, as property.³ Law must find ways to make animals legal subjects and not mere objects.⁴ We need to move toward a world in which human beings are truly Friends of Animals,⁵ not exploiters or users.

To make progress, we need theoretical approaches that are sound in terms of reality, grappling with what we know about animals, and that also direct law in a useful fashion. In this Article I will examine two

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1. See Jane Goodall, *Forward* to STEVEN M. WISE, *RATTLING THE CAGE*, at ix, x–xi (2000).
2. See *id.* at xii.
3. See *id.*
4. See *id.*
5. Wild Life Law Program, *Nussbaum to Activists: 'Let's Have Work and Hope,'* FRIENDS OF ANIMALS (Feb. 15, 2017), <https://www.friendsofanimals.org/news/2017/february/nussbaum-activists-'let's-have-work-and-hope'> (summarizing remarks by the author at an event co-hosted by Friends of Animals, a non-profit, international animal advocacy organization, and the University of Denver).

extremely influential approaches to animal entitlements in philosophy, both of which have implications for law and policy: the “So Like Us”⁶ approach and the “Least Common Denominator”⁷ approach. I shall argue that both are defective intellectually, and also in terms of strategy. A version of the Capabilities Approach, an approach to justice for both humans and other animals that I have developed over the years, does far better in directing ethical attention. Does it also do better in directing legal strategy?

THE “SO LIKE US” APPROACH

One prominent and influential approach to animal ethics and law seeks recognition of legal personhood, and some autonomy rights, for a specific set of animal species, on the grounds of their human-like capacities. This approach is associated, above all, with activist and author Steven A. Wise.⁸ Wise is one of the most significant pioneers of animal law. His 2000 book *Rattling the Cage* took the field of animal ethics into law, with striking results.⁹ His course on animal law at Harvard Law School was one of the first law school courses of its kind. And, as the leading figure in the 2016 documentary *Unlocking the Cage*, he eloquently describes to the film’s many viewers the goals of the Nonhuman Rights Project, which he leads; the film follows his legal battles to win limited personhood rights for several chimpanzees being held in captivity.¹⁰

Wise’s focus in the 2000 book was on chimpanzees and bonobos,¹¹ but by now he explicitly includes all four species of great apes, as well as elephants (presumably all three species) and whales and dolphins (presumably all species of both of those).¹² His argument rests heavily on claims about the similarity of these animals to human beings. They are, he says, self-conscious, they are self-directing, they have a theory of mind, they have culture, they are not “cabined by instinct,” they are able to contemplate their own future. In general they are “really really smart.”¹³ Centrally, he holds that they are “autonomous creatures” who, for that reason, should have “autonomous lives.”¹⁴

Wise is not a philosopher, and he does not explain which of the concepts of autonomy used by philosophers he has in mind. Since he also says that he thinks of chimpanzees as at the level of a five-year-old

6. See generally STEVEN M. WISE, *RATTLING THE CAGE* (2000) (using the “So Like Us” approach to argue for legal changes for animals).

7. See *infra* Section titled The Least Common Denominator Approach.

8. WISE, *supra* note 6.

9. *Id.*

10. UNLOCKING THE CAGE (Pennebaker Hegedus Films 2016).

11. WISE, *supra* note 6.

12. UNLOCKING THE CAGE, *supra* note 10.

13. *Id.*

14. *Id.*

human child, it is not clear that he really should ascribe autonomy to them, if that means, as it typically does, the ability to criticize one's desires in the light of some higher-order principles, or, as Kant famously held, the ability to free oneself from the influence of religion and culture.¹⁵ Probably he means some less exacting form of self-directedness, such as the ability to choose among alternatives. (But surely many other species of animals exercise choice!) In any case, as both book and film repeatedly emphasize, Wise thinks these species of animals are very like humans, and he makes that likeness the basis for his crusade to win them some limited legal rights.¹⁶ It would surely be valuable for him to investigate the notion of autonomy further, since we do not think that five-year-old children should be emancipated from their parents, nor do we think that they have a right to an independent self-planned life (or other rights associated with that, such as the right to sexual consent, the right to decide on one's own medical treatment, and so forth). Nor does Wise actually maintain that autonomy rights entitle apes to life without some type of supervision or guardianship: he reassures courts that he is seeking only to have the badly treated chimps transferred to a different supervised setting, not to have them utterly freed.¹⁷ It is never made clear why he thinks that guardianship is good for apes, and he presumably does not think that human guardianship is good for whales and elephants, although he does not comment on this. So the concept of autonomy and its implications for animal lives remain unclear in his conception. One hopes that Wise will clarify the notion of autonomy rights in further work.

By showing how like us animals are, Wise hopes to demonstrate, he says in the film, that the line typically drawn in law between humans and animals is irrational and needs rethinking.¹⁸ If we think that children deserve some rights, albeit with some qualifications and limitations, we should grant that these species of animals also have rights. It is irrational and inconsistent to treat all humans as persons, bearing rights, and to treat all animals as like mere things. At this point Wise uses an analogy to slavery: just as law used to treat slaves as mere property, and we have now seen that this was morally heinous, so too we should realize that our current treatment of animals is morally heinous.¹⁹ In the film the slavery analogy gets strong pushback from some of Wise's interlocutors, presumably because it can be read as suggesting, inappropriately, that African-Americans are like chimps, which is not the idea he means to

15. See generally J.B. SCHNEEWIND, *THE INVENTION OF AUTONOMY* (1998) (providing the history of the idea of autonomy, Kant's view, and its influence on modern concepts); GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* (1988) (leading philosophical account in terms of higher-order desires).

16. See WISE, *supra* note 6; *UNLOCKING THE CAGE*, *supra* note 10.

17. *UNLOCKING THE CAGE*, *supra* note 10.

18. *Id.*

19. *Id.*

convey.²⁰ So he backs away from the analogy; but he does not back away from the core idea that we must make a transition in law from thinking of animals as mere things and property to seeing them as persons.²¹ He repeatedly points out that corporations are given rights under law; the extension of rights to self-directing animals is surely an easier step than that!²²

Throughout both book and film, Wise presents lots of evidence that the core species of animals have human-like abilities of many types.²³ His central rhetorical strategy in the film is to show us chimpanzees and other apes doing things that the viewer will immediately recognize as human-like: using sign language, giving displays of empathy when shown a film of humans displaying emotions, and so forth.²⁴

The idea that some animals are surprisingly like humans, and that this has implications for the way we should treat them, is not new. In 55 B.C. the Roman leader Pompey staged a combat between humans and elephants.²⁵ Surrounded in the arena, the animals perceived that they had no hope of escape.²⁶ According to Pliny, they then "entreated the crowd, trying to win their compassion with indescribable gestures, bewailing their plight with a sort of lamentation."²⁷ The audience, moved to pity and protest by their plight, rose to curse Pompey—feeling, writes Cicero, that the elephants had a relation of commonality (*societas*) with the human race.²⁸

Not all religions and world-views have held that humans are a superior species. Buddhism and Hinduism have more generous views of the world of nature.²⁹ As Richard Sorabji shows, even in the Western tradition the humans-on-top view was not held by most of the ancient Greco-Roman schools of philosophy, most of whom refused to draw a sharp line between humans and other animals, and some of whom strictly prohibited meat-eating, along with all infliction of pain on animals.³⁰ But the ancient Greek and Roman Stoics, enormously influential both in antiquity and in the development of Christian ethics, did hold that non-human animals were mere brutes, without thought or emotion, while

20. *Id.*

21. *Id.*

22. *See id.*

23. *See id.*; WISE, *supra* note 6.

24. UNLOCKING THE CAGE, *supra* note 10.

25. GAIUS PLINIUS SECUNDUS, PLINY THE ELDER: THE NATURAL HISTORY BOOK VII 251 (Tyler T. Travillian ed., Bloomsbury Academic 2015) (n.d.) [hereinafter PLINY]; CASSIUS DIO, DIO'S ROMAN HISTORY 361 (Earnest Cary, trans., Harvard University Press 4th prtg. 1969) (n.d.).

26. *See* DIO, *supra* note 25, at 361, 363; RICHARD SORABJI, ANIMAL MINDS AND HUMAN MORALS 124 n.21 (1993) (quoting PLINY, *supra* note 25).

27. SORABJI, *supra* note 26, at 124 n.21 (quoting PLINY, *supra* note 25).

28. *Id.* at 124–25.

29. MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE 320 (2006) [hereinafter FRONTIERS OF JUSTICE].

30. *Id.* at 125.

humans are quasi-divine, and that on that account we can use them as we wish.³¹ Stoicism influenced Christianity, but so too did Judaism, which similarly held that the human being is special. Made in the image of God, the human is the only truly intelligent and spiritual being, and the only being to whom salvation is open.

This view is still the dominant view in Judaism and Christianity.³² And it is the dominant view, as well, among moral philosophers whose intuitions have been formed in that tradition. A notable example is leading moral philosopher Richard Kraut, who, in an important paper on the notion of goodness holds that we must be able to say why human life is special, in order to justify our intuitions that it is all right to do medical experiments on animals but not on humans.³³ Kraut never proposes to criticize those intuitions, and I mildly suggest that he might want to do that!³⁴

Wise knows his audience, and he makes the shrewd guess that if he is to move the needle on animal rights he will have to begin where the audience is. He calls this beginning “the first salvo in a strategic war” and also talks of “kicking the first door open.”³⁵ So he clearly isn’t indifferent to the wider project of winning rights for all animals. And his close and determined attention to the capacities and deprivations of some species is surely commendable. Nonetheless, one might raise worries. The choice of a theoretical framework influences where we will be able to go. It is important to get the theory right for reasons of truth and understanding. And it is also important to get a strategy that starts us in the right direction, rather than pointing us down a blind alley.

What, then, might be some problems with Wise’s strategy from the philosophical viewpoint? Most obviously, it validates and plays upon the old familiar idea of a *scala naturae* (ladder of nature) with us at the top. Some animals get in, but only because they are like us. The first door is opened, but then it is slammed shut behind us: nobody else gets in. Instead of the old line, we have a slightly different line, but it is not really all that different, and most of the animal world still lies outside in the dark domain of mere thinghood.

31. See *id.*

32. There are dissident strands in both, and when Pope Francis told a little boy that his dead dog was in heaven, his remark, heretical and rapidly withdrawn, still picked up on something that many people like to believe. At the time of my adult bat mitzvah in 2008, I was told by our cantor that Israeli animal activists have rewritten the Kaddish, or prayer for the dead, in order to include prayer for dead animals. I considered using this version, although in the end I did not because it is one of the few prayers that Reform Jews learn by heart, and they would be very upset to encounter new Hebrew words.

33. See Richard Kraut, *What is Intrinsic Goodness?*, 105 CLASSICAL PHILOLOGY 450, 456 (2010).

34. See Martha Nussbaum, *Response to Kraut*, 105 CLASSICAL PHILOLOGY 463, 467 (2010).

35. UNLOCKING THE CAGE, *supra* note 10.

The idea of the ladder of nature is essentially a religious idea, whether in its Stoic form (where only humans partake in Zeus's rational plan for the universe) or in its Judeo-Christian form. It derives from anthropocentric religions, according to which God, imagined as rather like us only better, using speech, reasoning, and language, makes us special, like God, and then values us because we are Godlike. The idea of superiority is not drawn from looking at nature, and it does not correspond to what we see when we look at nature, if we can put aside our arrogance. What we see are thousands of different animal life-forms, all exhibiting a kind of ordered striving toward survival, flourishing, and reproduction. Life-forms don't line up to be graded on a single scale: they are just wonderfully different. If we want to play the rating game, let's play it fairly. We humans win the prize on the IQ and language parameters. And guess who invented those tests! But many animals are much stronger and swifter. Birds do vastly better on spatial perception and the ability to remember distant destinations. Most animals have a keener sense of smell. Our hearing is very limited: some animals (e.g., dogs) hear higher frequencies than we can and many (elephants, whales) hear lower frequencies.³⁶ We sing opera, birds sing amazing birdsong, whales sing whale songs. Is one "better?" To a lover of music that's like asking whether we should prefer Mozart or Wagner: they are so different that it is a silly waste of time to compare them on a single scale.

As for life-sustaining abilities: rats are far more successful reproducers and survivors; numerous animals from tubeworms to bowhead whales have greater individual longevity. Shall we ask about moral abilities? Well, we pride ourselves there, but we humans engage in depths of deliberate cruelty and torture known to no other animal species, and no other species makes systematic war against its own kind. Do we think we are the most beautiful? Jonathan Swift was persuasive when he depicted Gulliver, after years with the lovely horselike Houyhnhnms, finding the human shape and smell disgusting.³⁷ No other animal has such arrogance about its beauty. At the same time, no other animal hates itself and flees from itself.

In short, if we line up the abilities fairly, not prejudging in favor of the things we happen to be good at, many other animals "win" many different ratings games. But by this time the whole idea of the ratings game is likely to seem a bit silly and artificial. What seems truly interesting is to study the sheer differentness and distinctiveness of each form of life. Anthropocentrism is a phony sort of arrogance. How great we are! If only all creatures were like us, well, some are, a little bit. Rather than unsettling our thinking in a way that might truly lead to a

36. See HAL WHITEHEAD & LUKE RENDELL, *THE CULTURAL LIVES OF WHALES AND DOLPHINS* 120–21 (2016)

37. JONATHAN SWIFT, *GULLIVER'S TRAVELS* 135–84 (6th ed. 2005).

revolutionary embrace of animal lives, Wise just keeps the old thinking and the old line in place, and simply shifts several species to the other side.

The *scala naturae* is not just intellectually lazy and complacent: it is also dangerous in other ways. It discourages useful self-criticism. It leads to ugly projects in which humans imagine transcending their merely animal bodies, by casting aspersions on the smells and fluids of the body.³⁸ These projects are so often accompanied by attempts to subordinate some other group of human beings, on the grounds that they are the true animals.³⁹ Bad smell, contaminating physicality, and hypersexuality are imputed to some relatively powerless subgroup, as an excuse for violent types of subordination. One may trace these ideas in U.S. racism, in the Indian caste hierarchy, in misogyny everywhere, in homophobia.⁴⁰ Wise's strategy does nothing to undermine these baneful human practices; indeed it reinforces them with its line-drawing. When what we need is a wholly new way of seeing our bodies, it gives us the same old way, with a few minor adjustments.

Wise's approach, furthermore, cuts most of the animal kingdom adrift with no help from his interventions. He clearly doesn't want this result, but it's hard to know what his theory yields for the terrible suffering of pigs and chickens, for the loss of habitat by polar bears and dozens of other wild species. Or rather, it is not hard to know what he offers, but all too easy: he offers nothing. A wholly new approach would need to be invented once we move outside the special sphere of the species who are so like us. He gives us no idea what that new approach would be. What is totally lacking is wonder at the diversity of nature, love of its many distinctive forms of life.

There is a further disturbing consequence of the "so like us" approach: it leads to a focus on artificial performances that are not really characteristic of the species as it lives its life in the wild. Thus "Unlocking the Cage" spends a good deal of time on sign language, and it is indeed true, and impressive, that chimpanzees, bonobos, and gorillas can learn sign language.⁴¹ But they don't use it when they are not living

38. See generally MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004) (critiquing the role that shame and disgust play in human beings' individual and social lives and, in particular, the law).

39. See generally *id.*

40. See *id.*; see generally MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* (2010) (arguing that disgust has long been among the fundamental motivations of those who are fighting for legal discrimination against lesbian and gay citizens). On December 16-18, 2016, the University of Chicago Center in Delhi, India, held a large conference on Prejudice, Stigma, and Discrimination to investigate the relationships among these types of disgust-subordination and yet others. The papers are planned for a volume to be edited by Zoya Hasan, Aziz Huq, Martha C. Nussbaum, and Vidhu Verma. Of particular interest for readers of the present paper will be Dipesh Chakrabarty's paper on the caste hierarchy, in which he argues that we must totally reimagine our relationship to nature.

41. UNLOCKING THE CAGE, *supra* note 10.

among humans. Indeed, although dolphins occasionally carry human-learned behavior with them back into the wild and teach it to other dolphins,⁴² I am not aware of any case in which apes have done the same thing. It just isn't useful to them. And although Wise might have demonstrated the empathy and emotion of apes and elephants in many ways, as Frans De Waal has done for decades,⁴³ he instead dwells, in the film, on an example of empathy that is conveyed through the use of sign language.⁴⁴ A gorilla watches a movie in which a child is saying goodbye to its family, and makes the signs for sad and so forth. Again, using sign language to indicate emotion is something apes do for and to humans, not something they do among themselves—although among themselves they have, as De Waal repeatedly shows, plenty of ways of communicating emotion.⁴⁵ Wise presumably likes the sign language-empathy example because it helps him establish likeness to us. But it is a pet trick. It becomes very hard, in fact, to understand the rationale by which Wise condemns some taught ape tricks, such as the ape doing karate kicks, and yet loves and foregrounds the language tricks. Both are similar, it seems to me (assuming the karate was taught through positive reinforcement and not cruelty): parlor tricks that show something about the animal, but not something that lies at the heart of its form of life. Whether it is ethical to teach such tricks can surely be debated, and I'm sure Wise would defend the language trick for what it teaches us. But that's just it: what it teaches *us*, not what it does for and in the animal life.

Wise argues that we need to begin by focusing on only a few rights for a few species, because people will be terrified if the door is open to all sorts of rights for all sorts of creatures. Will my dog be able to sue me? Will I have to give up eating meat? But that all depends on what is being asked. Sure, if someone said all animals should be given the right to vote, people would go crazy. But Wise's approach also has to exercise caution. If Wise were asking that all apes would immediately be allowed to roam with no guardianship or supervision, people would also go crazy, so he insists that this is not what he is asking — a concession that complicates his demand for habeas corpus. Any proposal, then, can prove unacceptably radical if its demands are extreme. But a proposal that asks for a species-specific level of ethical consideration for a wide range of creatures need not do that. And people appreciate consistency and theoretical integrity. Sooner or later, people will wake up to the fact

42. See WHITEHEAD & RENDELL, *supra* note 36, at 120–21 (2016) (describing the example of a dolphin standing vertically on its tail).

43. See generally FRANS DE WAAL, GOOD NATURED (1996) (demonstrating all kinds of animals respond to social rules, help each other, share food, resolve conflict to mutual satisfactions, and even develop a crude sense of justice and fairness).

44. UNLOCKING THE CAGE, *supra* note 10.

45. See WAAL, *supra* note 43.

that Wise is playing bait and switch: likeness to humans for some creatures, some other as yet unannounced rationale for other creatures.

THE LEAST COMMON DENOMINATOR APPROACH

It is then with a certain relief that we turn, or return, to the theoretical approach to animal entitlements that has led the way, in the Western tradition, since the end of the eighteenth century: the Utilitarian approach, pioneered by Utilitarianism's founder, Jeremy Bentham,⁴⁶ and best known from the important work of Peter Singer. I have discussed the contributions and shortcomings of the Utilitarian approach to animals in quite a few publications, so here I must be brief.⁴⁷

Bentham famously held that the salient ethical facts, and indeed the only salient ethical facts, are pleasure and pain.⁴⁸ He strongly insisted that pleasures and pains do not vary along any qualitative dimension, but only along several dimensions of quantity (of which duration and intensity are the most important).⁴⁹ The goal of each individual sentient being is, and ought to be,⁵⁰ the maximization of net pleasure. The goal of a rational society ought to be the maximization of net pleasure for all of society's members.

It is at this point that Bentham points out that given the salience of pleasure and pain, there is no good reason to exclude animals from the Utilitarian calculus. "The question is not, Can they *reason*? Nor, Can they *talk*? But, Can they *suffer*?"⁵¹ Bentham was keenly aware of animal suffering, and developed strong arguments against hunting and fishing for sport, as well as other cruel practices.⁵² Peter Singer follows Bentham's line.⁵³

46. See generally Jadran Lee, Bentham on the Moral and Legal Status of Animals (June 2002) (unpublished Ph.D. dissertation, University of Chicago) (on file with ProQuest Information and Learning Company, Ann Arbor, MI).

47. See generally Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506 (2001) (critiquing WISE, *supra* note 6); FRONTIERS OF JUSTICE, *supra* note 29, at 325–407; Martha C. Nussbaum, *The Capabilities Approach and Animal Entitlements*, in THE OXFORD HANDBOOK OF ANIMAL ETHICS 228 (Tom L. Beauchamp & R. G. Frey eds., 2011) (rejecting the classical utilitarian approach to the ethics of animal treatment and proposes a theoretical approach); Martha C. Nussbaum & Rachel Nussbaum Wichert, *The Legal Status of Whales and Dolphins* (forthcoming 2017).

48. See generally JEREMY BENTHAM, THE COLLECTED WORKS OF JEREMY BENTHAM: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J. H. Burns & H. L. A. Hart eds., Oxford Univ. Press 1996).

49. See generally *id.*

50. Bentham notoriously leaves the move from "is" to "ought" undefended.

51. BENTHAM, *supra* note 48 (emphasis in original).

52. See generally Lee, *supra* note 46. Much of Bentham's work remains unpublished in an archive at University College, London, and is gradually being published; Lee was able to study some of the unpublished and also all of the recently published material.

53. See generally PETER SINGER, ANIMAL LIBERATION (1975) (arguing the interest of animals should be considered because of their ability to experience suffering).

What is undoubtedly valuable about the Benthamite approach is its emphasis on the terrible cruelty of human behavior to animals and the suffering it inflicts. Pointing to the commonality between humans and animals in respect of suffering, moreover, is to point to something clearly relevant to animals themselves, and a salient fact about their lives. Chimpanzees can learn language but do not care much about it. All animals flee pain and give evidence of strong aversion to it.

Moreover, now that more of Bentham's work is becoming available, we are able to see that Bentham was undertaking what Steve Wise definitely does not undertake, and what I suggested we must undertake: a radical assault on the human-animal divide in Christian ethics and its ranking of lives and abilities, its puritanism about bodily pleasure, its relative indifference to bodily pain. Especially in the radical work *Not Paul But Jesus*, published in full only in 2013,⁵⁴ Bentham's insistence that pleasures differ only in quantity can be seen clearly as a radical assault on Victorian ideas of "higher" and "lower" pleasures, aimed at establishing the value of nonmarital and unconventional sexual relations and at decriminalizing homosexual sex. So Bentham is not being obtuse when he says all pleasures are one, he is being radical, and his radicalism leads him to an embrace of the body that offers a good basis for a restored attitude toward animals.

Still, there remain very serious problems with the Benthamite approach. The first and most obvious is its account of the social goal: the maximization of net pleasure. Bentham tells us little about how we should aggregate pleasures across creatures, and little about how quantities would be assigned to pleasure and pain. But on any plausible reading the calculus produces an aggregate figure, whether a total or an average, and it has no account of the permissible floor. Bentham was averse to the idea of rights, and that means that he offers us no account of the bare minimum beneath which a creature should not be permitted to fall. Everything depends on uncertain empirical calculations. On the average conception, according to which we are supposed to maximize average utility understood as net pleasure, egregious harms to animals will still be allowed by the view, so long as we can show that these harms raise the average pleasure in the world, and no pleasures are disqualified—not, for example, by the fact that they are malicious or sadistic. It is far from clear that the calculus gives us reasons to stop humans from inflicting torment on animals, since humans greatly enjoy those bad practices. The argument that this torment is unjustified rests on a fragile and uncertain empirical calculation. On the total conception, according to which we are supposed to maximize total utility, things are

54. JEREMY BENTHAM, *NOT PAUL, BUT JESUS* (London 1823); see also Martha C. Nussbaum, *Love from the Point of View of the Universe: Walt Whitman and the Utilitarian Imagination*, in *POWER, PROSE, AND PURSE* (Alison LaCroix, Saul Levmore & Martha C. Nussbaum eds.) (forthcoming) (under review at Oxford Univ. Press).

even more problematic: for we can add to the world's total by deliberately bringing into the world creatures, of whatever species, whose lives are extremely miserable, just so long as the lives exhibit a slim net balance of pleasure over pain. Meat-eating practices do result in the deliberate creation of millions of animals who would never have existed otherwise, and this could end up looking like a good thing under Utilitarianism, depending on how we measure pleasures and pains in those lives. In general, Benthamism supplies no account of urgent entitlements grounded in justice, and we badly need such an account to make sense of the human-animal relationship.

A second problem lies in Bentham's insistence in reducing quality to quantity. We get a very narrow account of what is important in animal (including human animal) lives: just pleasure and the avoidance of pain, and recall that Bentham insists that all pleasure is qualitatively similar. Thus there is no room for the special value of free movement, of companionship and relationships with other members of one's kind, of sensory stimulation, of a pleasing and suitable habitat. In this failing Benthamism converges with Wise's approach: both refuse to consider fully, and positively value, the many complex forms of life that animals actually lead. Pleasure and pain simply are not the only relevant issues when evaluating an animal's chances to flourish.

This problem would be less grave if deprivation of some aspect of its natural form of life always produced a commensurate pain. Then Bentham might be able to get to the correct conclusion, albeit by a defective route. It has long been argued that this is not the case for human beings: the familiar economic concept of "adaptive preferences" refers to the fact that humans who are deprived in some area often tailor their preferences and satisfactions to the reduced way of life they have known,⁵⁵ probably in order to avoid pointless longing and striving. Thus women who are brought up thinking that a "good woman" does not get a university education or participate in politics will very likely not feel pain at her exclusion from these things.⁵⁶ It takes a consciousness raising movement to get her to see what she is missing and why it could be important for her.⁵⁷ Unfortunately the same is very likely true for many animals. An animal raised in captivity cannot form an imaginative conception of a wild habitat, and thus cannot yearn or long for it. Nor can an animal cut off from characteristic social interactions with other members of its kind imagine what those interactions are like, or grieve for their absence. Ironically, then, if humans do only a little depriving the animal may be able to feel pain about it, and that pain will register in the Utilitarian calculus; but if humans deprive the animal in deeper and more

55. See MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT ch. 2, *Passion* (2000).

56. See generally MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT (2000) (explaining the concept and applying it to the lives of women in developing countries).

57. See *id.*

fundamental ways, they may not even get to the point of missing what they don't know, and that pain will not register in the Utilitarian calculus.

Finally, Bentham seems to think of pleasure as a feeling.⁵⁸ That feeling is typically produced by an activity: the pleasure of eating is produced by eating, the pleasures of friendship by friendship. But of course it might be produced in some other way. Philosopher Robert Nozick imagines an "experience machine": hooked up to that machine you would have the impression that you were eating, talking to your friends, and so forth, and you would have the enjoyment related to those pursuits—but without doing anything at all.⁵⁹ Nozick bets that most people would reject the experience machine, since being the author of their own actions is important to them, not just the experiences they have.⁶⁰ Surely the same is true of animals, and Wise is correct to emphasize the importance of agency. He just defines it too narrowly: most animals like doing things; being the author of their actions matters to them. The Utilitarian approach has a hard time accounting for this.⁶¹

Utilitarianism, then, has great advantages but also great problems.

RESPECTING THE DIVERSITY OF ANIMAL LIVES

Both of the approaches I have considered have a common problem: they reduce the complexity of animal species into an unhelpful simplicity. Wise levels up: reason is the thing, and look how many creatures have it. Singer and the other Utilitarians level down: pain is the thing, and all creatures have it and have it alike. What we need is the complexity of reality: an approach that looks at the whole of animal nature without a single linear ranking, one that focuses on our evil doing when we cause pain, but also on the complicated capacities of animals for many types of fascinating activity, the need of all animals for full and flourishing lives.

The Capabilities Approach (hereafter CA) was developed initially with only the human case in mind.⁶² But it was developed using materials drawn from Aristotle, who advocated that we seek what is shared among all animals and seek a "common explanation" for the self-maintaining and self-reproducing striving that characterizes all animal lives.⁶³ So it is

58. Not all agree: the Western philosophical tradition includes thinkers who see pleasure as an activity (Epicurus, Aristotle), and others who think that pleasure is closely linked to activity, "supervening" on activity (Aristotle again, since Aristotle has two different views).

59. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 42–45 (1974).

60. *Id.*

61. Of course one might invent a special pleasure and call it the pleasure of agency, but unless this pleasure is understood to be qualitatively, not just quantitatively, different from other pleasures, it will be difficult to capture the intuition contained in the example.

62. See MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 17–18 (2011) [hereinafter CREATING CAPABILITIES].

63. See MARTHA C. NUSSBAUM, ARISTOTLE'S *DE MOTU ANIMALIUM* (1978).

not surprising that it proved easy to extend it to the lives of animals.⁶⁴ The CA argues that the right thing to focus on, when asking how well a group of humans (or a nation) is doing, is to look not at average utility, and not simply at opulence (GDP per capita), but, rather, at what people are actually able to do and to be.⁶⁵ The best approach focuses on people's substantial freedoms to choose things that they value.⁶⁶ The right question to ask is, "What are you able to do and be, in areas of importance in your life," and the answer to that question is the account of that person's "capabilities."⁶⁷ I have distinguished three different types of capabilities. First, there are **basic capabilities**, the innate equipment that is the basis for further development.⁶⁸ Second are **internal capabilities**, abilities of a person developed through care and nurture. Developing internal capabilities already requires social resources.⁶⁹ But a person might have these inside, so to speak, and still not be fully capable of choice and action. Such a person might, for example, be capable of political speech but denied the chance to act politically. So, the really important type of capability for a decent society is what I call **combined capabilities**, internal capabilities plus external conditions that make choice available.⁷⁰

Thus far, capabilities specify a space of comparison, and that is the main use of the approach in Amartya Sen's work, as in the Human Development Reports of the United Nations Development Programme of which he was a leading architect.⁷¹ But in keeping with my interest in theories of justice and in constitution-making, I have gone further, using the idea of capabilities to describe a partial approach to basic justice.⁷² For that purpose, of course, we must get definite about content—as users of the approach comparatively do already in their choice of examples. I have proposed a list of ten capabilities that must be secured up to a minimum threshold level, if a nation is to have any claim to justice:

The Central Human Capabilities

1. **Life.** Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.

64. See CREATING CAPABILITIES, *supra* note 62, at 18.

65. See *id.* at 18–19.

66. *Id.* at 18.

67. See *id.* at 18, 20.

68. *Id.* at 23.

69. *Id.* at 21.

70. *Id.* (characterizing the combined capabilities approach briefly). The same list of Central Capabilities appears in all my publications dealing with the approach.

71. See *id.* at 17.

72. See *id.* at 19–20.

2. Bodily Health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. Bodily Integrity. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. Senses, Imagination, and Thought. Being able to use the senses, to imagine, think, and reason -- and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain.

5. Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

6. Practical Reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)

7. Affiliation.

A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)

B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

8. Other Species. Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. Play. Being able to laugh, to play, to enjoy recreational activities.

10. Control over one's Environment.

A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.

B. Material. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.⁷³

This list, humble and revisable, is an abstract template that can be further specified in accordance with a particular nation's history and material circumstances.⁷⁴

Now let us turn to animals. As you can see, number 8 on the list already includes relationships with other species and the world of nature as a central political good. But that is certainly not enough. I have also urged adopting a similar list of capabilities as ethical goals for all animals.⁷⁵ In the human case, I justify the list by arguing that these opportunities are inherent in the notion of a life worthy of human dignity.⁷⁶ I then argue that dignity belongs to other animals as well: all are worthy of lives commensurate with the many types of dignity inherent in their many forms of life.⁷⁷ All animals, in short, should have a shot at flourishing in their own way.

In some concrete ways the human list is a bad fit: freedom of the press and employment opportunities have a place in human lives that they do not have in other animal lives. But if we simply focus on the large general categories, the list seems to be a good guide, which can then be specified further for each animal after a study of its form of life. If the human list is a template for constitution-making, so too is the list for each animal species: a written basis for an unwritten constitution for that species. It tells us the right things to look for, the right questions to ask.

Very generally, all animals deserve ethical consideration, meaning ethically informed concern for the types of lives they are trying to lead. The list directs our attention to a host of pertinent factors. What life span is normal for that species in the wild? What is the physical condition of a healthy animal? What human acts invade or impair the bodily integrity of

73. *Id.* at 33–34.

74. *See id.* at 36.

75. *See id.* at 158.

76. *See id.* at 36.

77. *See id.* at 161.

that sort of animal? What types of movement from place to place are normal and pleasurable for that sort of animal? What types of sensory and imaginative stimulation does this animal seek, and what is it to keep that animal in an unacceptably deficient sensory environment? What is it for that sort of animal to live in crippling and intolerable fear or depression, or with a lack of bonds of concern? What types of affiliations does this animal seek in the wild, what sorts of groups, both reproductive and social, does it form? What types of communication does the animal engage in, using what sensory modalities? What is it for the animal to be humiliated and not respected? What is it for this animal to play and enjoy itself? Does the animal have meaningful relationships with other species and the world of nature? What types of objects does this animal use and need to control if it is to live its life?

Capability number 6, practical reason, pertains more to some animals than to others, in that some engage in more complicated strategies and plans. Perhaps that is what Wise means by autonomy.⁷⁸ But all animals direct their own course by their own powers of thought, whatever those are. Again, political participation seems not pertinent to non-human animals, but of course it is pertinent for them, just as for us: it is through politics that the conditions of life are agreed to, and someone who has no political standing has no voice in choices that govern his or her life. So too for animals: if they have no legal standing and no legal status that guarantees ethical consideration, then they have no voice in what happens to them. As Wise notes, beings and groups that cannot literally speak have been granted legal standing: humans with profound cognitive disabilities, young children, and corporations.⁷⁹ So it is clear that political participation can pertain to a creature even when its exercise of that capability must take place through forms of advocacy or surrogacy.

Each creature, then, deserves ethical consideration for what it is, and a kind of constitution that specifies what harms it should not be permitted to suffer—not in terms of its likeness to humans or its possession of some least-common-denominator property, but in terms of what it is itself, the form of life it leads.

What does this mean for law? One example may help carry our discussion further. For there is a happy harbinger of what may be a new era in law, in the form of a remarkable 2016 opinion by the U. S. Court of Appeals for the Ninth Circuit Court of Appeals. In *Natural Resources Defense Council, Inc. v. Pritzker*,⁸⁰ Ninth Circuit ruled that the U. S. Navy violated the law in seeking to continue a sonar program that

78. UNLOCKING THE CAGE, *supra* note 10.

79. *Id.*

80. 828 F.3d 1125 (9th Cir. 2016).

impacted the behavior of whales.⁸¹ To some extent the opinion is a technical exercise in statutory interpretation of the Marine Mammals Protection Act: the court says that the fact that a program has “negligible impact” on Marine Mammals does not exempt it from a separate statutory requirement, namely that it establish means of “effecting the least practicable adverse impact on” marine mammal species.⁸² What is significant, and fascinating, is that the argument relies heavily on a consideration of whale capabilities that the program disrupts:

Effects from exposures below 180 dB can cause short-term disruption of abandonment of natural behavior patterns. These behavioral disruptions can cause affected marine mammals to stop communicating with each other, to flee or avoid an ensounded area, to cease foraging for food, to separate from their calves, and to interrupt mating. LFA sonar can also cause heightened stress responses from marine mammals. Such behavioral disruptions can force marine mammals to make trade-offs like delaying migration, delaying reproduction, reducing growth, or migrating with reduced energy reserves.⁸³

The opinion does not give whales standing; no such radical move is necessary to reach the clear result that the program is unacceptable. But it does recognize whales as beings with a complex and active form of life that includes emotional well-being, affiliation, and free movement: in short, a variety of species-specific forms of agency.⁸⁴ The opinion goes well beyond Bentham, and it also eschews the anthropocentric approach. It is a harbinger, it is to be hoped, of a new era in the law of animal welfare.

81. *See id.* at 1142; *see generally* JOSHUA HORWITZ, *WAR OF THE WHALES: A TRUE STORY* (2015) (describing the sonar program in detail).

82. *Pritzker*, 828 F.3d at 1142.

83. *Id.* at 1130–31.

84. *See id.*