Dear NYU friends,

I am circulating a book proposal for a book now under contract to Simon and Schuster, due December 2020, and an article that gives the essence of the book’s approach, accepted in the Journal of Human Development and Capabilities. I greatly look forward to our discussion.

Martha
OTHER ANIMALS:
RESPECTING COMPLEX FORMS OF LIFE

Under contract to Simon and Schuster

Martha C. Nussbaum

This book is about wonder: about the surprise and awe that the diversity and complexity of animal lives awaken in us, if we pause long enough to learn and see. It is about ethically attuned vision: about the way that looking and seeing lead us almost inexorably to care for what happens to these amazing fellow inhabitants of our planet. But it is also about theory. It has to be, for law and policy - the most direct means we have of effecting change - are based on the theories we have about the subjects that law treats. And theories all too often embed distortions coming from social traditions. In our relationships with other animals, our most prominent guiding theories are profoundly defective. That's why both domestic and international law have built huge edifices over foundations that are not just shaky but in many ways rotten, poisoned by a false view of the human-animal relationship.

This book will offer a new approach to, and a new theory of, that relationship. I believe we are sorely in need of such a theory, because the two theories that now dominate our view obscure our ethical and legal obligations and have resulted in inadequate policies and laws. What I will suggest here is that a new version of the Capabilities Approach (initially developed by Amartya Sen and me to assess domestic and global life-quality and foster human welfare), focused on fostering and protecting animal lives, is the guiding theory we need, both in our ethical thinking about our fellow animals and in constructing law and public policy. I have already begun to explore the legal and policy implications of the CA in a handful of short pieces about animal rights and law, but this project will represent my first book-length confrontation with all the issues inherent in the human-animal relationship.

Many excellent recent books have demonstrated the complexity of animal lives and the way their activities interface. Among the most recent are Frans De Waal's Are We Smart Enough to Know How Smart Animals Are? (Norton, 2016), Jennifer Ackerman's The Genius of Birds (Penguin, 2016), Nathan Emery's Bird Brain (Princeton, 2016); G. A. Bradshaw's Carnivore Minds (Yale, 2017); and Hal Whitehead and Luke Rendell's The Cultural Lives of Whales and Dolphins (Chicago, 2016). My book is a philosophical companion to this new hands-on research, emphasizing the social complexity and the variegated intelligence of animal lives and the need to study the whole life form in its context, rather than ranking it against some abstract (and typically anthropocentric) template of "intelligence." I will draw on the results of these and many other inquiries - but I will then move forward to articulate a new theory that can be the basis for better ethical deliberation and, ultimately, for respectful and adequate laws and policies.

My approach is philosophical, but by now it has become the subject of a lively interdisciplinary conversation. Animal rights organizations in the United States, public policy schools, social service agencies, and legal groups working on the legal rights of animals have all devoted extensive attention to the Capabilities Approach. One salient example is the organization Friends of Animals (Denver and Connecticut), which has created a legal project based upon the approach, asking for and articulating a "right to ethical consideration" for animals. I work with that organization on a regular basis, and the approach is beginning to be used in challenging trophy imports, the trafficking of wild animals into US zoos, the confinement of wild horses, and numerous other issues that I will discuss in my later chapters.

The conversation about capabilities is also multinational, since the ideas have engaged a variety of international groups. But what has been lacking so far is a real manifesto: a short book stating the essentials of this distinctive approach to animal ethics and law. Just as my 2012 book
Creating Capabilities (Harvard) filled a gap by providing an elegant overview to the Capabilities Approach as a whole, so, now, this new book will provide a reimagining of the Approach as a way of dealing with the difficult ethical, political, and legal challenges of respecting animals in our rapidly changing world.

My overall argument will begin with, as I've said, an examination of why and how the two leading approaches in law and policy (both US and international) fall short in very different ways. One approach buys into the old medieval idea of thescala naturae, the "ladder of nature," according to which animal natures are ranked in a hierarchy of goodness or value, with humans, and the peculiarly human brand of rationality, at the top (just beneath God). Some animals rank high enough on the ladder that they are almost "like us," being capable of choice and language, and these few animals (apes, elephants, maybe whales) deserve moral respect and legal protection. They are persons like us. Other animals remain in limbo.

The other approach, that of British Utilitarian Jeremy Bentham and his modern successor Peter Singer, philosopher and animal rights activist, sees all animals as very similar in susceptibility to pleasure and pain, and makes those two experiences the sole sources of ethical value and disvalue. Nature is all alike, and in all nature pleasure is the sole good, pain the sole bad.

What both of these approaches fail to grasp is that the world we actually live in is one of surprising variety and diversity, in which lives are not ranked along any single dimension. Careful attention reveals neither a "ladder" nor a single goal, but, instead, great complexity in the interlocking of activities that comprise any single animal way of life. These approaches fail, that is, in wonder, in open-eyed curiosity. The first approach is willing to see only one template, the human one; the second acknowledges only one aspect of animal lives. Animals are not well understood if we start from the question how much like us they are. Nor are pleasure and pain the only things relevant to animal lives. Animals are complexly social; they communicate, they move, they play, in countless specific ways, and the parts of a life-form are interlocking – motion with reproduction, sociality with feeding.

My approach is like Utilitarianism in taking sentence to mark a very important boundary. Pain is very important, and ending gratuitous pain is an urgent goal. But unlike Utilitarianism, my approach sees pleasure and pain as aspects of complex lives but recognizes other relevant aspects: dignity, for one, social capacity, curiosity, and free movement among others. (In making these criticisms of Utilitarianism I follow the lead already given by John Stuart Mill, who made Utilitarianism into a more flexible instrument for addressing human needs and aspirations. Mill cared deeply about animals and left his estate to the Society for the Protection of Cruelty to Animals, but he never spelled out his ideas about the philosophical basis for animal rights. And he made some distinctions, in particular a distinction between "higher pleasures" and "lower pleasures," that are probably unhelpful in getting the right idea of our kinship with the other animals and the right whole-hearted acknowledgment of that kinship. So you might say that I want to say what Mill would have said about animals had he been less afflicted by Victorian prudery and shame!) Now to the book's structure.

Chapter 1. A World of Forms of Life

My opening chapter will draw on recent work on animal lives to paint a picture of the range of lives that we need to think better about, each unlike every other, and all quite unlike our own. Here are just a few brief examples to give you the idea:

Elephants
In November 2017, in West Bengal, India, a herd of elephants was crossing the railway tracks. (Herds consist of numerous adult females and the young born during the past year. Male adults roam as loners and do not bond with any group.) As so often happens, a train was going about double the speed limit and was unable to stop. Two baby elephants got caught on the tracks and could not escape. A group of adult females turned back, coming to the aid of the babies. The train killed five elephants on the spot and injured three more, two of whom subsequently died. Trains had to be stopped for two days because a large herd of elephants gathered at the site, guarding the dead and injured elephants.

**Whales**

Whale song has long been admired for its complexity and beauty. Recently scientists Hal Whitehead and Luke Rendell, two of the world’s leading whale experts, have shown that the dissemination of song patterns follows cultural and not genetic processes. A new song will be innovated off the coast of Australia, and within a year it will “catch on,” being picked up by groups of whales who never used that song pattern before. This is only one of many examples of cultural learning in whale groups. Even more surprising, whales living close to dolphins imitate dolphin whistles and even begin to lose their characteristic whale calls.

**Birds**

There is so much most people don’t know about birds: their remarkable capacities for tool use, for memory, for phonic imitation, for finding their way in space, often over extremely long distances. New research also shows evidence of many types of social intelligence and cooperation. The phrase “bird brain” is used pejoratively to denote low intelligence, but science has for some time been revising that estimate.

**Mice**

Surprising complexity appears, too, in a part of the animal world that we’re accustomed to think of as “lower.” In June 2008, Science published an article entitled “Social Modulation of Pain as Evidence for Empathy in Mice” by a research team at McGill University in Montreal. The scientists injected group of mice with a weak solution of acetic acid, which induced squealing and writhing. (It caused only mild discomfort and had no long-term harmful effects, so it passed ethics review.) Also in the cage at the time were other mice who were not injected. The experiment had many variants and complexities, but to cut to the chase, if the non-pained mice were paired with mice with whom they had previously lived, they showed signs of being upset. If the non-pained mice had not previously lived with the pained mice, they did not show the same signs of emotional distress. On this basis, the experimenters conclude that the lives of mice involve social complexity: familiarity with particular other mice prepares the way for a type of emotional contagion that is at least the precursor to empathy.

**Octopi**

It used to be a firm conviction that a central nervous system centered in the brain was necessary for any type of cognitive complexity. Now we are starting to see things differently. Octopi, who lack a central nervous system, exhibit some striking behaviors that show evidence of some type of intentional action: they flock in large numbers to sites that researchers now call “underwater cities,” piling up scallop shells and human debris. While some octopi bring scallop back to the site to eat, others dig burrows among the shells, which stabilize and structure the site. Meanwhile, octopi at the site perform displays, probe each other with their arms, and often try to evict other octopi from their dens. Although good scientists are careful not to overclaim, it does appear that this behavior involves both planning and coordination.

The animal world is wonderful. Amazing patterns appear wherever we look, if we look. Expecting the “best” animals to be like us is a recipe for not seeing.
Armed with these thoughts, I now confront the defective theories.

Chapter 2. The Scala Naturae and the “So-Like-Us” Approach

Judeo-Christian traditions have long been deeply committed to a picture of the world of nature in which life-forms are hierarchically ordered in a “ladder of nature” or scala naturae. In ascending order of intelligence and cognitive capacity, intelligence is modeled on human intelligence, with language, capacity for argument, capacity for free choice or autonomy, and self-conscious inwardsness as key features. Not surprisingly, since humans invented this picture, humans end up at the top. For centuries we have been looking at animal lives through this defective prism, which obscures so much about their lives. If we made a “ladder” around abilities of spatial perception, birds would easily win the race. If we featured kindness and an absence of cruelty to fellow species members, elephants would do far better than humans. If we looked simply for reproductive fitness, rats would be kings. And so forth. But really, the whole ratings game is absurd, obscuring the distinctive complexes of traits that comprise each type of animal life, and also the many different forms of abilities that we tend to prize most, such as intelligence and aesthetic capacity. (The creativity and innovative properties of whale songs are only just beginning to be understood.) The primary reason we invented the “ladder” in the first place was to position ourselves as close as possible to God, imagined as very similar to us but more so. Whether a person believes in God or not, it seems wrong to imagine divinity in such a narrow and self-flattering mode.

Because the scala naturae is so popular as a way of viewing the world, so deeply embedded in many if not most people’s ethical thinking, one leading approach to animal lives in law and policy relies on it. Animal activist Steven Wise, author of the book Rattling the Cage and hero of the documentary Unlocking the Cage, has spent years seeking to reclassify certain species of animals (above all the great apes, but now including whales and elephants) as “persons” alongside humans, thus winning for them a menu of legal rights, including habeas corpus, legal “standing” in courts, and limited rights to autonomy. His strategy relies on depicting these animals as very similar to humans in terms of possessing the properties on top of the traditional “ladder”: language use, a capacity for autonomy or self-direction, and a range of human-like emotions. This “so like us” approach can certainly win some impressive legal victories, and for Wise it is useful as a strategy to move the needle, getting courts to reach decisions beneficial to those animals. He does not rule out using different approaches to win rights for other animals.

I argue, however, that by reinforcing the humans-at-the-top picture, Wise makes it much harder to win legal rights for animals who do not resemble humans in any way. Cutting off four types of animals from all the others seems wrongheaded and inaccurate as an approach to the world, one likely to retard broader progress toward full respect for animal lives. And in making his case Wise relies on non-central aspects of even his chosen animals’ lives, such as the ability of apes to use sign language. Apes can learn sign language, but they get along just fine without it, and communicate in different ways in the wild. Sign language is a parlor trick for humans, not a salient part of ape culture. Wise may win some battles, but in the process he risks setting back the clock and making an adequate theoretical confrontation with animal lives much more difficult.

Chapter 3. The Least Common Denominator Approach: Pleasure and Pain

In the late eighteenth century, the great British Utilitarian philosopher Jeremy Bentham issued a clarion call. Comparing our current treatment of other animals to slavery, he said, “The question is not, ‘Can they reason?’ but ‘Can they suffer?’” For Bentham, pleasure and pain are the key ethical properties, to which all the others are reducible. And, for Bentham, pleasure is
unitary, varying only in quantity (intensity and duration), not in quality. The aim of a rational politics should be to maximize the net balance of pleasure over pain in the universe.

Bentham never fully unfolded the implications of his idea for animal law and policy in detail, but he was clearly opposed to hunting and fishing for sport, and all cruel games and sports involving animals. He approved of meat-eating only provided that the animal had a decent life in the wild first and then was killed painlessly. (He reasoned that because other animals do not foresee their own death, or carry out projects that unfold over a length of time, death does not harm them the way it harms humans. This contention may be doubted in the light of recent knowledge, and I will discuss the issue later.) Bentham’s radical views would clearly have forbidden the factory farming industry, which did not exist in his time. Today, Bentham’s worthy successor, Peter Singer, has used Utilitarian ideas to crusade for the humane treatment of all animals, including prominently an end to factory farming and to hunting for sport.

Utilitarianism is radical in a truly productive way, and its ideas have been crucial to much recent progress in limiting human cruelty to animals. But it is too simple. Pleasure and pain are very important, but pleasures and pains themselves are plural and complex, with qualitative as well as quantitative differences, as Bentham’s great pupil John Stuart Mill, in the mid-nineteenth century, saw. Moreover, as Mill also realized, there are things in animal life (whether human or nonhuman) not easily reducible to pleasure and pain: activities and movements of many types, social relations, dignity. Now that we know a lot more about animals, we know that protecting them from unnecessary pain is not the end of the matter. If it were, many zoos would be fine homes for animals. But animals need to move, often over large stretches of terrain. They need the company of their characteristic social group, often a large one. They need light and air. They need not to be laughed at and made to do parlor tricks. It’s not just that these things inflict pain. Sometimes they do, sometimes they don’t. But they diminish the animal life, as we can easily see by examining the choices of animals not so confined.

Chapter 4. One Promising Way Forward: Korsgaard’s Aristotelian Kantianism

In her Tanner Lectures, “Fellow Creatures,” philosopher Christine Korsgaard creates a hybrid ethical approach that goes beyond the two approaches previously discussed. Although Korsgaard’s starting point is Kant, who certainly believed in the scala naturae and thought that we have ethical obligations only to humans, Korsgaard argues that we may use the core ideas of Kantian ethics to justify duties to all animals. Noticing that we are ourselves hybrid beings, on the one hand rational and moral, on the other hand self-nourishing and reproducing like other animals, we reason that duties of self-respect must include duties to cultivate and properly value our own animal nature. But then, if we are consistent, we ought to recognize a similar duty to value, protect, and cultivate the other creatures with whom we share that nature.

Korsgaard’s approach is promising, but I think it goes wrong in two ways. First, it splits our human form of life into the godlike part and the animal part, rather than seeing that all our abilities are those of a particular type of animal, all complexly bound up together. Second, Korsgaard in the end falls into the Steven Wise error of valuing animals in virtue of their likeness to ourselves.

Still, her arguments show us something valuable. Any good approach must have a kind of Kantian element, respecting the dignity of animal lives, and also an Aristotelian element, recognizing the complex interweaving of activities and abilities that characterize any instance of animal life. The question is how to put those two parts together.

Chapter 5. The Capabilities Approach

This chapter introduces the Capabilities Approach, briefly describing the salient differences between my version of the approach and Sen’s. I then show how it can be expanded to give an
attractive account of animal forms of life and an ethical ground for respecting the dignity of these lives.

The Capabilities Approach was introduced first as a theory, within international development policy, of the correct way to measure a nation or region’s well-being. Rather than measuring by GDP per capita, users of the approach ask the question, “What are people actually able to do and be” – in some areas especially pertinent to human flourishing. The GDP approach ignored distribution, and could give high marks to nations containing alarming inequalities, so long as the average was high enough. The Capabilities Approach has always been focused particularly on the experiences and opportunities of people “at the bottom” in terms of social power. It asks a lot of questions about how many people lack basic necessities and basic opportunities. The GDP approach also ignores the fact that people need and want more than one thing out of life. They need good health, protection for their bodily integrity, political rights and liberties, education, and much more. The CA has always been insistently pluralistic, refusing to reduce all good things to one good thing. So used, the approach has fostered new ways of ranking and comparing.

But I have gone further. In my own work on the approach, I have used it to establish basic constitutional rights, essential ingredients of a decent or minimally just society. This means specifying which capabilities are most central for public purposes, and I have tried to do that. What my approach says is: all people are entitled to demand at least a minimum threshold level of each of ten central capabilities. It is this version of the approach that I plan to adapt for animal lives.

Chapter 6. Difficult Questions

The Capabilities Approach must confront a variety of difficult questions. This chapter delves into them, showing just how fraught they are and what fertile ongoing debates exist among users of the approach. These questions include:

1. **Why animals and not plants?** Shouldn’t the approach be extended to all self-maintaining life forms, including plants as well as animals? I reply by defending the importance of sentience as a ground of ethical considerability.

2. **Why individual beings and not ecosystems?** Ecosystems clearly play an important instrumental role in supporting all animal lives. I argue, however, that this importance is instrumental only, and that it is the individual creature who is the bearer of dignity.

3. **What about human-animal conflicts?** The ethical imperative to protect and preserve animal lives is not simple, since human and other animal lives conflict in many areas, as when humans seem to need animals for food; as when necessary research seems to require the suffering of animals; as when the competition for scarce land and resources pits human populations against their animal neighbors (for example, conflicts in Africa between elephants and local villagers, whose trees the elephants destroy); as when some human cultures seem threatened in their very existence if practices involving cruelty to animals (hunting, whaling) are curtailed by law (as when traditional cultures say that hunting deer, or harpooning whales, is essential to the maintenance of their way of life). Here I articulate a notion of tragic conflict (about which I’ve written in other works), arguing that some of these conflicts are situations in which there is no morally unproblematic course. Seeing this should motivate us to work for a future in which the conflict might be eliminated or at least alleviated by better planning.

4. **The limits of human intervention:** Should we try, insofar as possible, to leave (wild, nonsymbiotic) animals alone in “the wild,” a place full of cruelty, scarcity, and casual death, or should we actively intervene to protect animals? If the latter, in which ways? I argue for a moderate interventionist approach, including stepping up research into animal contraception.
5. **Urgent human needs**: In a world where humans are starving and dying from lack of medical care, can we possibly justify spending time and money caring for other animals? I argue that we should not give any absolute priority to human interests but also that the dilemma is falsely posed; most of the current threats to human life from poverty and disease comes from the absence of effective governmental institutions, not from "natural" limits to the earth's capacities. We can and should envisage, and work for, a multispecies world in which all have opportunities for flourishing. And we must go even further, for an ethical attunement to the lives of animals and a sense of wonder at their complexity and dignity is part of our humanity, without which human life itself is impoverished.

When we think we have to inflict hardship on animals in order to preserve a healthy human community, my analysis of tragic conflict tells us that we ought to step back, asking how we got into that bad situation, and what we might do to produce a future world in which that grim choice does not arise. Thus, if villagers complain that they will starve if they can't keep elephants from eating their crops, we ought to ask what can be done to limit both human and animal populations in future and to police property in such a way that each community has its own place.

6. **What is the harm of death?** How should we think of the painless death of an animal who has lived a decently free life for a decent length of time? Bentham, as I've mentioned, thought that killing such an animal humanely is morally acceptable, provided that it is among the animals who do not foresee their own death. More recent Utilitarians such as R. M. Hare and Peter Singer concur, thus making room for at least some meat-eating as ethically acceptable.

The view I have developed about death in earlier work is that death is a harm to the creature who dies primarily because it cuts short various life-activities in midstream, making them seem empty and futile. Just as someone who studies for the LSAT and then dies before going to law school has wasted those unpleasant hours of study, so in most parts of human life, where we work hard to prepare for something and then to pursue it to its completion, premature death renders our planning and effort empty and vain. But a human being age 100, who dies painlessly having lived a complete life, probably is not harmed by death in the same way. I will unfold my view more fully, but then argue that an animal who has no elaborate plans whose fulfillment extends over a long period of time does not have a strong interest in avoiding a painless death that follows a mature and happy life. That is, many animals are rather like that 100-year-old, even when they are not aged. But quite a few animals do have structured plans and activities — on this Bentham was just wrong. So if we accept a version of the argument it does not justify our current practices where many animals are concerned, and, given that animals do not consent to being killed, it may not justify them at all. My own view is that it is better to eat only those animals who have lived a happy life and died a painless death, and whose level of cognitive complexity does not admit of complex planning. Others may judge that I've drawn the line wrong, and I myself am uncertain whether any eating of animals is morally acceptable. But at any rate we can perhaps all agree that the factory farming industry is a moral horror.

Chapter 7. The Way Forward in Law and Policy

Where do these arguments leave us? What is it to cultivate our human capacity for ethically-attuned wonder in law and policy? In this chapter I discuss a range of current issues in domestic and international law, showing what a "right of ethical consideration" (developed by Friends of Animals with my participation) means in practice, and what current controversies it could help us address.

I begin with a remarkable recent decision by the US Ninth Circuit Court of Appeals in **NRDC v. Pritzker** (2016) which invalidated the U. S. Navy's sonar program on the grounds that it interfered with whales' movement and breeding patterns. The program was owed some
deference, since it had strategic use for the military. It did not inflict pain. Nonetheless, the justices, who had done their homework about whale life forms and patterns, ruled that the mere interference with key aspects of the whale form of life was reason enough to strike it down. The justices do not mention the capabilities approach; but in their own way, using learning, curiosity, and what I would call wonder, they reach the conclusion this approach would recommend. Such a conclusion could not have been reached by the Benthamite view, since the program does not inflict pain; nor could it have been reached by Steven Wise’s approach, since the aspects of whale lives that were salient to this decision are not like human lives at all: they involve movement over thousands of miles, and breeding patterns involving seasonal movements.

Using this decision as a template of what it means to have ethical consideration for nonhuman animals, I consider: the extension of legal “standing” to animals; the heinous practice of factory farming; the lives of symbiotic animals, and how dogs and cats can exercise a type of political choice in lawmaking (an area of the subject pioneered by Will Kymlicka in Zoopolis); trafficking in animal trophies, and the practice of trophy hunting, both outside and within the U. S.; the practice of whaling, which should be utterly illegal under international law; the confinement of animals in zoos and theme parks, which should be illegal for elephants and marine mammals; the question of how to limit animal population size when overgrowth threatens life quality (where I support animal contraception very cautiously). Many more issues will be discussed, once my research for the book is complete.

A Note on Prior Publications of Mine and Their Use in This Book

As I write these new chapters, I will inevitably draw on certain articles I’ve either published in the past or am about to publish, all in academic journals or anthologies:


None of this material will be used verbatim in this new project. Indeed, while the new project may play on some ideas I’ve written about in two of my own books in the past — in my edition and commentary on Aristotle’s De Motu Animalium (my very first book, 1978), where I discuss how perception, desire, and movement are interrelated in diverse animal lives, and Frontiers of Justice (2006), where I devote one chapter to showing how my overall philosophical approach can be extended to animals, it is only recently that I have begun to fully develop what I think about this subject. For example, I have not previously addressed and criticized rival approaches to animal
ethics, and it is only recently that I've spoken of my approach in policy and law. This book is meant as a new and far more complete statement of my thinking on animal rights and the relationship between humans and animals.

Timing and Length

Because I need time to read a lot of recent research on animals I know less about than I do about whales, dolphins, and elephants (for example, about birds, octopi, fish, and also dogs and cats), I propose a delivery date of the end of 2019.

The book will be roughly 60,000 to 70,000 words.
WORKING WITH AND FOR ANIMALS: GETTING THE
THEORETICAL FRAMEWORK RIGHT

MARTHA C. NUSSBAUM†

FORTHCOMING JOURNAL OF HUMAN DEVELOPMENT AND
CAPABILITIES

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. 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. 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. Law must find ways to make animals legal subjects and not mere objects.

† Ernst Freund Distinguished Service Professor of Law and Ethics, University of Chicago Law School and Philosophy Department. This paper was originally published in a shorter version in the Denver Law Review 94 (2017), 609-25, and is being reprinted by permission. A discussion of the original article can be found at our website, denverlawreview.org. As always I am especially grateful to Rachel Nussbaum Wichert for discussion. I also owe thanks to Breena Holland, whose provocative comments appear with this article. Most of the expansions and changes to the previous article were prompted by excellent and searching questions from the audience at the annual HDCA meeting in Cape Town, South Africa.

1. See Goodall (2000), ix, x–xi.
2. See id. at xii.
3. See id.
4. See id.
to move toward a world in which human beings are truly “Friends of Animals,” 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 essay I will examine two extremely influential approaches to animal entitlements in philosophy, both of which have implications for law and policy: the “So Like Us” approach and the “Least Common Denominator” 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. 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. 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.

Wise’s focus in the 2000 book was on chimpanzees and bonobos, 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). 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.”

7. See infra Section titled The Least Common Denominator Approach.
9. Id.
13. Id.
he holds that they are “autonomous creatures” who, for that reason, should have “autonomous lives.”

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 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. 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. 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. 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. 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

14. Id.
15. See generally Shneewind (1998) (providing the history of the idea of autonomy, Kant’s view, and its influence on modern concepts); Dworkin (1988) (leading philosophical account in terms of higher-order desires).
17. Unlocking the Cage (2016).
18. Id.
seen that this was morally heinous, so too we should realize that our current treatment of animals is morally heinous. 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 convey. 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. 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.

Throughout both book and film, Wise presents lots of evidence that the core species of animals have human-like abilities of many types. 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.

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. Surrounded in the arena, the animals perceived that they had no hope of escape. According to Pliny, they then "entreated the crowd, trying to win their compassion with indescribable gestures, bewailing their plight with a sort of lamentation." 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.

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. 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. But the ancient Greek

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19. Id.
20. Id.
21. Id.
22. See id.
25. Pliny (n.d. [2015]) [hereinafter Pliny]; Dio (n.d. [1969]). I read these sources in the original languages, but cite the translation only for the reader’s convenience.
30. Id.,125.
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 humans are quasi-divine, and that on that account we can use them as we wish. 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 is still the dominant view in Judaism and Christianity. And it is dominant, 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. Kraut never proposes to criticize those intuitions, and I mildly suggest that he might want to do that!

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.” 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. See Nussbaum (2010a), 463, 467.
34. See T. Nussbaum (2010).
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 tube worms 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 revolutionary embrace of

36. See Whitehead and Rendell (2016), 120–21.
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.\(^3\) 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.\(^4\) 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.\(^5\) 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.\(^6\) But they don’t use it when they are not living among hu-

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38. See generally Nussbaum (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 Nussbaum (2010b) (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 will appear in Zoya Hasan, Aziz Huq, Martha C. Nussbaum, and Vidhu Verma (eds.). 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 reimage our relationship to nature.
41. Unlocking the Cage (2016).
mans. Indeed, although dolphins occasionally carry human-learned behavior with them back into the wild and teach it to other dolphins,\textsuperscript{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,\textsuperscript{43} he instead dwells, in the film, on an example of empathy that is conveyed through the use of sign language.\textsuperscript{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.\textsuperscript{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 that Wise is playing bait

\textsuperscript{42} See Whitehead and Rendell (2016), 120–21 (describing the example of a dolphin standing vertically on its tail).
\textsuperscript{43} See generally de Waal (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).
\textsuperscript{44} Unlocking the Cage (2016).
\textsuperscript{45} See de Waal (1996).
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, 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.

Bentham famously held that the salient ethical facts, and indeed the only salient ethical facts, are pleasure and pain. 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). The goal of each individual sentient being is, and ought to be, 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?” Bentham was keenly aware of animal suffering, and developed strong arguments against hunting and fishing for sport, as well as other cruel practices. Peter Singer follows Bentham’s line.

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

46. See generally Lee (June 2002).
47. See generally Nussbaum (2001), 1506 (critiquing Wise (2000)); and Frontiers of Justice, 325–407; Nussbaum (2011), 228 (rejecting the classical utilitarian approach to the ethics of animal treatment and proposes a theoretical approach); Nussbaum and Nussbaum-Wichert (2018); Nussbaum and Nussbaum-Wichert (2017a); Nussbaum and Nussbaum-Wichert (2017b), 356-69.
49. See generally id.
50. Bentham notoriously leaves the move from “is” to “ought” undefended.
52. See generally Lee (June 2002). 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 Singer (1975) (arguing the interest of animals should be considered because of their ability to experience suffering).
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, 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 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

54. Bentham (1823); see also Nussbaum (2018).
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, 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. It takes a consciousness raising movement to get her to see what she is missing and why it could be important for her. 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 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. 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

55. *See Nussbaum* (2000).
56. *See generally* Nussbaum (2000) (explaining the concept and applying it to the lives of women in developing countries).
57. *See id.*
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).
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. 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. 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.

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. 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. So it is not surprising that it proved easy to extend it to the lives of animals. 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. The best approach focuses on people’s substantial freedoms to choose things that they value. The right question to ask is, “What are you able to do and be, in areas of importance in your life,”

60. Id.
61. Of course one might invent a special pleasure and call it the pleasure of agency; Mill appears to do so. 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. Mill understood this.
63. See Nussbaum (1978).
64. See Creating Capabilities, 18.
65. See id., 18–19.
66. Id., 18.
and the answer to that question is the account of that person’s “capabili-
ties.” I have distinguished three different types of capabilities. First, there
are basic capabilities, the innate equipment that is the basis for further
development. Second are internal capabilities, abilities of a person de-
veloped through care and nurture. Developing internal capabilities already
requires social resources. 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 ex-
ternal conditions that make choice available.

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 Devel-
opment Reports of the United Nations Development Programme of which
he was a leading architect. 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. For that pur-
pose, of course, we must get definite about content—as users of the ap-
proach comparatively do already in their choice of examples. I have pro-
posed 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.

2. Bodily Health. Being able to have good health, including reproduc-
tive 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 hu-
man” 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

67. See id., 18, 20.
68. Id., 23.
69. Id., 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., 17.
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.\footnote{Id., 33–34.}

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.\footnote{See id., 36.}

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.\footnote{See id., 158, and Frontiers of Justice ch. 6.} 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.\footnote{See id., 36.} 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.\footnote{See id., 161.} 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 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. 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. 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, Ninth Circuit ruled that the U. S. Navy violated the law in seeking to continue a sonar program that impacted the behavior of whales. 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. 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

78. Unlocking the Cage (2016).
79. Id.
80. 828 F.3d 1125 (9th Cir. 2016).
81. See id., 1142; see generally Horwitz (2015) (describing the sonar program in detail).
82. Pritzker, 828 F.3d, 1142.
each other, to flee or avoid an ensonified 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.

DIFFICULT QUESTIONS

This article has argued that the Capabilities Approach is equipped to provide an approach to animal lives superior to that offered by the two other leading approaches in politics and law. But the approach is just that, an approach. It needs to be further refined over time, and it needs to confront some very difficult questions. In this concluding section, I discuss some of them, in a way that is intended to be exploratory, not definitive.

1. Shouldn’t humans come first? The Capabilities Approach was inspired, in the first instance, by the urgent needs and sufferings of human beings. In a world where there is so much hunger and need, it can seem inappropriate or even frivolous to consider animal needs, unless one were to state unequivocally that humans come first. I have already given reasons for doubting the usual rationales offered for human superiority, but there remains the practical attachment we all have to our own species, and the feeling that it makes a huge difference whether the life saved is that of a human child or a kitten.

Different people have very different intuitive responses on these questions, and that itself ought to lead us to pause, to educate ourselves about animal lives, and to hesitate before asserting that humans deserve priority. But I think we ought to go further: our world is a shared world. Many creatures use this globe, and the species have complex interconnections of awareness and even reciprocity. Some religious views teach us that we are the masters of the world and other creatures our servants. But there are other images available in other religions, as well as in the lives of people who live close to animals: the image of a multi-species

83. Id., 1130–31.
84. See id.
world in which we can -- and, I believe, should -- cultivate much more reciprocity and mutual awareness.

We may go even further: an attunement to the lives of animals and a sense of wonder at their complexity and dignity is part of our humanity, which we blunt at our peril. Young children typically respond very keenly to animal lives and deaths. Indeed they often imagine their own emotions and perceptions through the stories of animals that they see and hear. The sharp separation of the human is not “natural,” it is cultural, and begins quite late. We can enrich human capabilities by keeping alive and further cultivating that sense of wonder and attunement.

The “right to ethical consideration” is a direction not a destination. It does not yet tell us how to address particular instances of conflict. But it tells us how to cultivate a humanity that can see conflict as conflict.

There are, and will continue to be, many instances of human-animal conflict, some of which Breena Holland’s reply discusses here, and some of which her co-authored paper with Amy Linch discussed previously. Ethical attunement means that we will not just shrug our shoulders and proceed. Instead, we will come to see many of these conflicts as genuinely tragic, meaning that there is no choice available that is fully right in the largest ethical sense. When we see such tragic conflicts, as I have often said, they should move us to search for a future that would not confront agents with such choices. Linch and Holland describe ways in which rituals involving hunting can be recast so as to eliminate cruelty. We can go much further, imagining substitutes for animal research (through computer simulation), and substitutes, which already exist, for fur, leather, and even meat. Pursuing the latter has large dividends for climate change, since meat-eating is a large cause of atmospheric warming. But if we do not think about animal suffering, we will not push our imaginations to develop these alternatives.

I believe that the future for both humans and other animals involves the intelligent use of contraception. But where other animals are concerned, this issue is controversial and perilous. Since other animals are not capable of consent to contraception, we need to be very sure that the form of life can bear this intervention without irreparable damage. The science of animal contraception is in its infancy.

2. The limits of human intervention. I have just spoken of a massive human intervention into animal lives. I have spoken of it as something to be approached with delicacy and caution, but I am not in principle opposed. However: shouldn’t humans try, insofar as they can, not to interfere in the lives of wild animals? Dogs, cats, and (most species of) horses have evolved as symbiotic domestic creatures. But that is not true

85 See Keymer (2017).
86 See the same Symposium.
of most animals, so shouldn’t we just try to protect their habitats and keep our hands off?"

The minute we say “protect their habitats,” however, we are talking already of responsible stewardship of wild places. We are not talking about total laissez-faire. Even after we prevent humans from polluting and developing large tracts of land where animals live, we need to intervene in other ways if they are really to be capable of living well. Large wildlife reserves in Africa spray for tsetse flies, monitor the area for fire and water damage, intervene in times of drought, and, of course, try very hard to stop poaching. I do feel that one might go yet further and protect vulnerable creatures from predation, but this view of mine is not generally shared. What I think ought to be shared, at any rate, is the sense that it is immoral to make money by exhibiting predation as a blood sport, and, believe me, lots of rich foreigners come to wildlife reserves in Africa precisely to see animals tear one another limb from limb. This entire issue needs far more discussion than it has as yet received. There is no such thing as “the wild,” in today’s world, there are only different types of human-controlled spaces, and we need to discuss the ethics of this control.

We also need to discuss an issue that lies at the other end, so to speak: should we or should we not interact systematically with “wild” creatures, creating, so to speak, a shared world? Some intelligent species, such as orcas and dolphins, do enjoy interacting with humans, and they even carry learned behaviors back into the animal community. Is this horrible or permissible? We can raise the same questions about apes and monkeys. On the whole it seems right that we should not render an individual creature incapable of living with its kind, but there is much interaction that stops short of that extreme, and all of this needs discussion. What we are really saying here is that forms of life intersect, and capabilities may migrate or interpenetrate. Looking closely at domestic animals can guide us about the limits of respectful interaction, if we beware of facile generalizations.

3. Why should we limit our ethical concern to animals? Since the Capabilities Approach, as I have discussed it here, focuses on species that have a form of life and some sort of complexly organized life-capacities, why not include plants in our concern? Naturally both plants and other particular elements of the natural world (the wind, rivers, seas) have enormous instrumental importance for human and animal lives. Ecosystems also have immense instrumental importance. But should we recognize these entities as among the ultimate ends for which the Capabilities Approach seeks to provide a support structure?

The answer to this question evidently makes a huge practical difference. It also makes a large theoretical difference, since granting intrinsic-
end status to ecosystems would mean jettisoning the principle that each individual being, and only individual beings, are to count as ends in themselves. I have long defended that principle, pointing out that every group we know (families, tribes, nations, religions) contains hierarchy and subordination, and of course they all subordinate women! Justice seems to require the dismantling of these hierarchies, and the best way to express our commitment to do so is to say that each individual counts as an end, and counts equally. That principle might possibly survive the move to include plants, though principles of individuation for plants are very unclear. It would not survive the inclusion of non-living parts of nature, and certainly not the inclusion of ecosystems.

Maybe that’s all we need to say, but it would be nice if we could say more. At this level of depth, all our intuitions are unclear and subject to great doubt. But one of my salient ones is that sentience is an important boundary in the world of nature, a baseline requirement of ethical considerability (as an end). The idea of injustice involves the idea of thwarting, and a being can be thwarted only if it is moving toward something, not just acting in ways that promote continued life, as plants surely do. Aristotle found the dividing line in the notion of orexis, usually translated “desire,” meaning a kind of reaching-out that, in his view, is always accompanied by sense-perception. That leaves a gray area: the “stationary animals”, such as sponges and anemones, are capable of some rudimentary sense-perception, but they do not move from place to place, so Aristotle does not think they have orexis. In any case, what I think is that the ability to perceive an object of desire, to move toward it, and to feel pain at thwarting is all necessary for ethical standing. Pain is the great evil, and the painless deaths of plants seem to me not to involve injustice or wrong, though they may be unfortunate in other ways. This may be wrong, and we surely need a lot more debate. But for now that is the reason why I do not extend the theory to plants. Utilitarian theories are not right about everything, but they see one large thing very clearly.

Nonetheless, I am cautious about this conclusion, and urge an extended debate about moral status and the scope of the Capabilities Approach.

4. Political Resistance. Steven Wise commends his approach as one that judges are already listening to. It fits handily into existing legal categories. Peter Singer and other Utilitarians also commend their approach for its practicality, arguing and showing that the fact of pain is capable of mobilizing the public as more abstract ideas are incapable of doing. The Capabilities Approach would appear to be at a double disadvantage: foreign to existing legal categories, and too subtle to have the dramatic impact of the focus on pain. I dispute both of these contentions.
First, the Capabilities Approach is actually not foreign to the history of U. S. law (for now I confine myself to one nation). The Framers were steeped in the thought of Aristotle and the Hellenistic philosophers, so it is not surprising that one can find many traces of the CA in their writings. Nor is it surprising that their emphasis has borne fruit in many areas of law, particular constitutional law. I have argued this in great detail in my Supreme Court Foreword, “Constitutions and Capabilities,” in the Harvard Law Review.\(^7\)

On the other side, thinking about what a given type of animal is actually able to do and to be is familiar to all children, whose earliest stories frequently concern animals who are social, mobile, curious, and complexly sentient, and who are often thwarted in their strivings. People who live close to animals or who study them in some other way do not see just pleasure and pain, they see a form of life with numerous aspects, complexly interacting. The narrative of an animal life is gripping precisely because we care about what animals are able to do and be, and reducing all this to pain and pleasure is what is strange and hyper-theoretical. Just as the Ninth Circuit reinvented the CA to deal with the whales they had studied and observed, so too, as humans learn more about animal lives, we can hope this type of consciousness will bear fruit in law and public policy.

It’s time to acknowledge that we share the world with other species, and that what they are able to do and be matters greatly. I claim that the Capabilities Approach is the most promising theoretical framework, as we pursue this urgent task of ethical awakening.

Reference List

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


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


*Unlocking the Cage*. 2016. Pennebaker and Hegedus (dr.).


