

NONHUMAN ANIMALS AND THE PROMISE OF THE CAPABILITIES

APPROACH

by

DANIEL L. CRESCENZO

(Under the Direction of Victoria Davion)

ABSTRACT

In my project I argue that my version of the capabilities approach provides a better framework for including animals as subjects of justice in Western liberal societies than Martha Nussbaum's version of the approach, Tom Regan's animal rights, Peter Singer's animal welfare, or any social contract theory. I first lay out Nussbaum's capabilities approach. Then I examine several versions of the social contract, highlighting a number of reasons that animals cannot be included as subjects of justice on a social contract theory. After this I consider Regan's animal rights and Singer's animal welfare accounts, as well as Val Plumwood's egalitarian account of the intentional other, Mary Midgley's affective account, and Clare Palmer's causal history account of our responsibilities toward animals. Drawing on Plumwood's and Palmer's work, in the last section, I craft a version of the capabilities approach that departs radically from Nussbaum's version in two ways: First, on my capabilities approach, individuals are valuable by virtue of their form of life, rather than by virtue of the capacities they actually have, and second, our responsibilities toward them are partly determined by the ways in which we have made them vulnerable to harm, rather than only by the overriding

moral directive to provide every individual the opportunity to flourish. I argue that these components of my account enable it to avoid critical problems that Nussbaum's account, Regan's animal rights, Singer's animal welfare, and social contract theories cannot.

INDEX WORDS: Capabilities approach, Martha Nussbaum, Animal ethics, Justice, Social contract theory, Animal rights, animal welfare, Val Plumwood, Clare Palmer

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CHAPTER 1

INTRODUCTION

ABSTRACT

In my project I argue that my version of the capabilities approach provides a better framework for including animals as subjects of justice in Western liberal societies than Martha Nussbaum's version of the approach, Tom Regan's animal rights, Peter Singer's animal welfare, or any social contract theory. I first lay out Nussbaum's capabilities approach. Then I examine several versions of the social contract, highlighting a number of reasons that animals cannot be included as subjects of justice on a social contract theory. After this I consider Regan's animal rights and Singer's animal welfare accounts, as well as Val Plumwood's egalitarian account of the intentional other, Mary Midgley's affective account, and Clare Palmer's causal history account of our responsibilities toward animals. Drawing on Plumwood's and Palmer's work, in the last section, I craft a version of the capabilities approach that departs radically from Nussbaum's version in two ways. First, on my approach, individuals are valuable by virtue of their form of life, rather than by virtue of the capacities they actually have. Second, following Palmer, I hold that our responsibilities toward them are partly determined by the ways in which we have made them vulnerable to harm, rather than only by the overriding moral directive to provide every individual the opportunity to flourish. I argue that these components of my account enable it to avoid critical problems that Nussbaum's account, Regan's animal rights, Singer's animal welfare, and social contract theories cannot.

In my project, I argue that my capabilities approach provides a better framework within which to include nonhuman animals¹ as subjects of justice in Western liberal societies than Nussbaum's version of the approach, animal rights, animal welfare, or social contract theory. My project is divided into five chapters.

In the first chapter I outline Nussbaum's capabilities approach. In the second, I outline some representative social contract theories, highlighting the ways in which they have dealt with the question of whether animals are subjects of justice. In the third chapter I outline Nussbaum's main arguments that social contract theory cannot include animals as subjects of justice and argue that some accounts of social contract that she does not consider also fail, but for different reasons. In chapter four I outline some prominent intrinsic and relational accounts of the value of individuals and of our responsibilities toward them.

In the final chapter, I craft a version of the capabilities approach that departs radically from Nussbaum's version in two ways: First, on my approach, individuals are valuable by virtue of their form of life, rather than by virtue of the capacities they actually have. Second, following Palmer, I hold that our responsibilities toward them are partly determined by the ways in which we have made them vulnerable to harm, rather than only by the overriding moral directive to provide every individual the opportunity to flourish. I argue that these unique components of my approach work together to make it a better framework through which to include animals as subjects of justice than Nussbaum's version of the approach, Regan's and Singer's animal ethics, and all social contract theories.

1. From here on, more simply, animals.

2. Nussbaum's Capabilities Approach

No author has developed the capabilities approach as a philosophical framework within which to see animals as subjects of justice more extensively than Martha Nussbaum. So I begin by outlining her version of the approach. For Nussbaum, justice is concerned with securing up to a minimum threshold for each individual each capability, or opportunity for activity or being, that has been judged essential for living a life worthy of dignity. These capabilities are not only judged necessary for a life worthy of dignity, but also partly constitutive of such a life. Each individual is viewed as an end. Anything that blocks or diminishes the central capabilities below the minimum threshold is a harm and anything that promotes them up to that threshold is a good. When it is not possible to secure each central capability up to the threshold level for each individual, we should act so as to do less harm than good.

Nussbaum maintains that we should reason in a particular way about which capabilities are essential for flourishing. With the aid of narrative stories that make as vivid as possible from our individual perspective the lived experience of others, we imagine [animal or human] lives. We then scrutinize considered judgments informed by these imaginings, following the reasoning process aimed at reflective equilibrium to determine which elements of a particular life are essential for a life worthy of dignity as a member of a particular species. All sentient animals are subjects of justice.

From this reasoning process, Nussbaum derives a list of central capabilities for human beings: life, bodily health, bodily integrity, senses, imagination, and thought, emotions, practical reason, affiliation, other species, play, and control over one's environment. She also derives a list of central animal capabilities that has each of the

items on the human list but is only intended to guide us in specifying species-specific animal capabilities lists. These lists serve as a basis for constitutional guarantees and are general enough to allow further specification through public deliberation.

How an animal may be harmed depends upon the capabilities it has as a member of a species, and the potential harm which can be done to animals with comparatively many capabilities is greater than that which can be done to animals with fewer capabilities because the former have more capabilities which can be denied. But less sentient animals are not less valuable or metaphysically lower. Rather, they are not as easily harmed.

Nussbaum argues that because animals' capacity for choice is generally compromised, we may treat them with intelligent paternalism – paternalism that leaves open spaces of choice necessary for flourishing, but that closes off others that may be inimical to that flourishing. Nussbaum applies her approach to questions of justice to different groups of animals: domestic animals, animals raised for food, animals raised for use in research, 'wild' animals living in captivity, and 'wild' animals living 'in the wild.'

Political justification for Nussbaum's capabilities approach comes in two parts: reasoning toward reflective equilibrium and the possibility of a Rawlsian overlapping consensus on the central capabilities. Nussbaum sees the latter justification as primary. The latter justification justifies by showing that central capabilities can, as entitlements, respect citizens' autonomy, and by showing that a constitutional regime in which these entitlements are enshrined can be stable over time.

3. Social Contract Theory and Animals

In this chapter I outline the ways in which social contract theorists have dealt with the question of whether animals are subjects of justice. I focus on more recent contract theorists because they have had the most to say about whether animals are subjects of justice.

John Rawls argues that the purpose of the state is to maintain a fair system of cooperation. Society is to be ordered according to fair principles that are the outcome of a fair procedure of reasoning about what those principles ought to be. Fairness is modeled into the reasoning procedure by seeing representatives as ignorant of certain features about themselves and about others. He calls this stepping behind the veil of ignorance and reasoning in the original position. Rawls thinks that his account of justice excludes animals because they lack the desire and ability to freely agree to and to abide by the rules of a fair system of cooperation.

Following Rawls' lead, Peter Carruthers argues that moral rules are binding on us because in following them, we ensure that our own and others' rationality is duly respected. Animals cannot be subjects of justice because imposing rules upon oneself and others requires a kind of comparative reasoning about the consequences of following different sets of rules that animals lack. Moreover, because animals are not sufficiently rational, there is nothing about them that a rational agreement needs to respect.

T. M. Scanlon develops his contract theory as a framework within which to understand the question of what we owe each other. Contractors wish to cooperate on terms that they cannot reasonably reject, and acts are wrong if adequately informed individuals cannot reasonably reject their prohibition. Reasonable principles that result

from considering each others' reasons and objections to those reasons limit coercion and harm of others. Animals cannot be subjects of justice because they lack the necessary linguistic capacity to form judgment-sensitive attitudes.

Andrew I. Cohen argues that animals do not have primary moral status since they do not take part in the contract agreement. Nevertheless, a form of contract theory that assumes minimal pragmatic constraints of fairness and non-coercion – what he calls contractarianism – can include animals as direct subjects of justice. It can do so when some of the contractors hold that animals are direct moral subjects, and those who do not think this agree out of respect for the former's preferences to abide by rules that protect animals as if they have direct moral status.

Mark Rowlands argues that Rawls has the right idea about how to structure the contract procedure, but that his account is illiberal because it excludes animals. He argues that individuals are not morally entitled to benefits they obtain through properties they are not responsible for having. Humans are not responsible for having capacities such as rationality. Thus humans are no more entitled to just treatment than animals on the basis of such capacities. Animals therefore ought to be included as subjects of justice. This equality can be modeled into the original position by excluding features like rational capacity and species membership from consideration. He further argues that this will among other things yield principles of justice that abolish animal husbandry and that direct us to leave 'wild' animals alone.

Finally, Kimberly K. Smith drops the idea of an abstract original position or state of nature and instead begins her social contract with the social conditions already present in particular Western liberal societies. With this starting point, we can judge which

animals are a part of the political community by asking (1) whether we recognize them as being subjects of justice and (2) whether the state has laws regulating individuals of their kind. Individuals that meet these conditions – household pets, for instance – are subjects of justice. Individuals that do not – many ‘wild’ animals, for instance – are not. Smith also argues that animals we raise for food are subjects of justice, but that killing them, as long as they have been raised humanely, is not unjust, but in fact a rightful privilege we claim in exchange for caring for them.

4. Problems with Social Contract Theory

I next outline Nussbaum’s arguments that social contract theory cannot include animals as subjects of justice for reasons that are not problematic for her own account. I further argue that her arguments are successful against Rawls’, Carruthers’, and Scanlon’s accounts, as well as some major theories in the classical contract tradition. But they do not succeed against Cohen’s, Rowlands’, or Smith’s accounts. Picking up where Nussbaum’s arguments fail, I argue that these social contract theorists also fail to include animals as subjects of justice, each for their own reasons.

Nussbaum develops two main arguments that social contract theory cannot include animals as subjects of justice: the argument from the circumstances of justice and the argument from the conception of the person. The first states that cooperation only occurs if it is mutually advantageous, and it is only mutually advantageous if there is a rough physical and mental equality among the contractors and a moderate scarcity of resources. But animals are not roughly mentally equal with humans. Thus, they are too easily dominated by them to be subjects of justice. I argue that this argument provides a

valid critique of Rawls' and Carruthers' accounts, as well as the accounts of classical contract theorists Hobbes and Locke.

Nussbaum's second argument, which she develops mainly against Rawls, states that individuals must possess the two moral powers – rationality and reasonableness – to a sufficient degree in order to take part in a fair system of cooperation. Moreover, only persons who possess the two moral powers to a sufficient degree are represented in the contracting process and only represented persons can be subject to the terms of the contract. Animals do not have the two moral powers to a sufficient degree. Hence, they cannot be direct subjects of justice. I argue that this critique is also valid against classical contract theorists like Hobbes, and any contract theorists who make use of the idea of Kantian rational contractors, such as Carruthers and Scanlon.

Nussbaum's capabilities approach avoids each of these arguments by starting with what people are really like, rather than a rationalistic, purely self-interested abstraction. Persons are interested in pursuing justice and in freely ordering their lives in accordance with practical reason. But they are also social, dependent beings with deep needs whose rational functioning cannot be separated from their "animal" functioning. Because we have benevolent sentiments and feel compassion for others, it does not need to be to our mutual advantage to cooperate in order for us to be moved to do so. And because the capabilities approach recognizes many different kinds of animal dignity that do not include Kantian rationality, animals are included as subjects of justice.

It is not obvious that Nussbaum's arguments are effective against Cohen, Rowlands, and Smith's accounts of the social contract. So I turn at this point to some of my own. I argue that the contractarianism that Cohen considers falls short in two ways.

First, if the constraints on the bargaining situation are merely pragmatic [as he claims they are], then there is no reason to think that the principles derived from them are moral principles. The pragmatic constraints must also be seen as moral ones if the principles derived are to be viewed as moral. Second, I argue that the ‘direct’ status that Cohen attributes to animals is really only indirect status. It is not enough that animals are treated as subjects of justice out of respect for contractors’ convictions about their moral status. On a liberal conception of what it is to be a subject of justice, they must be treated as such out of respect for their own good.

Rowlands’ neo-Rawlsianism faces a different set of problems. First, it is doubtful that contractors in Rowlands’ modified original position would choose not to engage in widespread intervention in nature. Second, Rowlands’ account is overly egalitarian. Principles derived from its version of a contract procedure cannot distinguish between harming humans and harming nonhumans when genuine moral conflicts arise. But this result runs contrary to the intuitive judgment, common in Western liberal societies, that though animals are subjects of justice, humans ought to be given weightier consideration (what I call the *human not-meriting intuition*). Any adequate constructivist account of justice must either incorporate the this intuition into their reasoning or explain why it is mistaken. Rowlands does neither.

Smith’s version of the social contract also has a serious flaw. By grounding the answers to questions of who ought to be a subject of justice in facts about who we view as a subject of justice, Smith’s account reduces to a kind of moral relativism. On her account, or instance, there is no way to argue that a society that by consensus excludes a particular minority race from consideration as subjects of justice has done anything

wrong. In order to avoid this result, a thicker conception of the good than the one she gives – one that goes beyond the good of policies that follow from free agreement among autonomous individuals – is necessary.

5. Capacities Accounts and Relational Accounts in Animal Ethics

Here I outline the prevailing paradigms in animal ethics – Tom Regan’s animal rights and Peter Singer’s animal welfare – each of which sees features intrinsic to individuals as the only morally relevant features of ethical situations. I also outline some philosophically rich alternative approaches that see not only intrinsic features, but also the relationships between individuals, as being morally relevant: Mary Midgley’s affective account, Val Plumwood’s account of the intentional other, and Clare Palmer’s account of duties to assist others that are grounded in our having made them vulnerable to harm.

Animal rights theorists argue that animals have a dignity or inherent worth by virtue of some feature that they share and that this worth grounds rights claims against others to treat them with respect. For Tom Regan, this feature is being an experiencing subject of life. We have a moral responsibility to respect the value of every experiencing subject of life – we owe it *to* them to treat them respectfully, and they have a right to receive such respectful treatment *from* us. This means, first, that we have a *prima facie* duty not to harm them. But all things being equal, we may harm a few innocents to prevent harm to many innocents (minimize principle), and when harms are not comparable, we should act to bring about the least harm to any one individual (worse-off principle). Finally, individuals have a freedom to pursue their own welfare at the expense

of others (liberty principle), so long as the ways in which they are made worse off are not plainly disrespectful.

Regan argues that we ought to stop animal agriculture and animal research, since as moral agents, we have a responsibility not to harm. But we have no similar responsibility to stop wild animals ‘living in the wild’ from harming one another, since they are not moral agents. He also argues that although every experiencing subject of life has equal inherent value, [normal adult humans’] experience is worth more than the experience of other experiencing subjects of life. Therefore, Regan argues, we are justified in choosing to save a [normal adult human’s] life over that of any other kind of experiencing subject of life when we are forced to choose.

Animal welfare theorists like Peter Singer, on the other hand, argue that animals deserve equal moral consideration because they share the morally relevant capacity to experience pleasure and pain. Equally pressing interests count equally across species lines, and we ought to act so as to maximize the satisfaction of the interests of the individuals affected by our actions. Like Regan, Singer argues that we ought to stop experimenting on animals and raising them for food. But his reasoning is different. For Singer, we ought not to do these things to animals in captivity because doing them causes more frustration of interests than not doing them. But with wild animals ‘living in the wild’, we would cause more frustration of interests by intervening in their relationships than we would by leaving them be. We ought therefore to leave them be.

Singer also argues that [normal adult] humans have a capacity to plan for the future and desire to see those plans fulfilled, and therefore, a desire to continue living, that other sentient animals do not have. He maintains that for this reason, death is a

greater harm for [normal adult] humans than it is for other kinds of individuals. It follows that it is morally worse to kill a [normal adult] human than it is to kill other kinds of sentient beings. Singer also argues that all attempts to justify giving human individuals moral priority independently of the capacities they actually have are rooted in an unjustified bias that he calls speciesism.

In contrast to animal rights and welfare accounts of value, relational approaches to ethics see the kind of relationship we have with animals as being relevant in answering the question of how we ought to treat them. According to Mary Midgley, for instance, the preference for one's own species is found in every culture, even when competition across cultures is strong, and so is very different from prejudices such as those based on race. Our preference for our own species is "an emotional, rather than a rational, preference...[and a] necessary part of our social nature..."² But we also care for animals as members of our human communities, forming common bonds of sympathy with them. Since we do not question that we have moral responsibilities toward humans with whom we have such bonds, we ought also to see ourselves as having moral responsibilities toward animals with whom we have them.

Val Plumwood rejects the idea that human beings are the archetypal moral subjects against whom the moral status of other beings ought to be measured, as well as the idea that human beings should view themselves as radically separate from 'the other' in nature. We should instead view 'others' in nature as morally valuable in their own ways, and "be open to contextual and negotiated relationships of communication,

2. Mary Midgley. *Animals and Why They Matter*. Athens: University of Georgia Press, 1983, 104.

balanced dialogue, and mutual adjustment between species, starting with our own.”³ Still, she leaves open the possibility that when all else fails, we may rank some beings over others in order to determine how to proceed.

Clare Palmer recognizes the importance of emotional bonds and openness to animals, but locates the morally relevant features of relationship in the causal connection we have with them. The driving question behind her account is how to explain what she calls the *laissez-faire intuition*: We have a duty to care for/assist domestic animals, but lack such a duty or perhaps do not have one to assist “wild” animals [“living in the wild”]. Palmer argues that greater need for autonomy of wild animals and greater harm than good caused by assisting them are not plausible reasons for the *laissez-faire* intuition. In place of these more common explanations for the intuition, Palmer argues that if we (i.e., moral agents) “act to harm wild animals or create/render them vulnerable to harm, then duties toward them may be generated. But where animals are living, as it were, in an independent wild state, these kinds of duties to assist, at least, are not generated.”⁴

6. The Case for My Capabilities Approach

In this chapter I explicate my own version of the capabilities approach and argue that it provides a better framework for seeing animals as subjects of justice than Nussbaum’s version, than animal rights or animal welfare, or social contract theory. I will first distinguish between methodological and strict egalitarian and inegalitarian accounts

3. Val Plumwood, *Environmental Culture: The Ecological Crisis of Reason*, New York: Routledge, 2002, 195.

4. Clare Palmer, *Animal Ethics in Context*, New York: Columbia University Press, 2010, 89.

in animal ethics and argue that adequate accounts of our moral responsibilities across species lines must be *methodologically egalitarian*. That is, they must hold that our first responsibility in any ethical situation is not to harm any morally considerable others – that if there is a way to proceed without harming, then one ought to act in that way, whatever the relative value of the individuals involved. I further argue that methodological egalitarianism of any kind calls for the dismantling of industrial animal agriculture and harmful animal experimentation, but that it permits certain kinds of hunting.

In the next section I argue that methodological egalitarianism ought to be coupled with a type of *strict inequality* – the view that when it is impossible to act without impeding flourishing, *then and only then*, we ought to consider whether some of the individuals involved are more morally valuable than others. I argue that an account of the relative value of individuals ought to be grounded in their form of life, rather than in the capacities they actually have. That is to say, I argue for a *life-form hierarchy of value* in lieu of an actual-capacities hierarchies of value – the kind of account of value that is more commonly embraced among animal ethicists (including Regan, Singer, and Nussbaum).

Both actual-capacities and life-form hierarchies can explain our considered judgments about the greater value of normal adult human beings relative to other kinds of beings. However, actual-capacities views cannot explain why severely cognitively impaired humans or small children, along with their normal adult counterparts, ought to take priority over nonhuman beings when we are forced to choose between their flourishing, whereas life-form views can: The human form of life is more valuable. Moreover, human individuals are more valuable by virtue of their form of life, then

giving them moral priority is not speciesist, but the right thing to do. This reasoning is also non-anthropocentric in that it applies across species boundaries, so that chimpanzees take priority over ibex, whatever the capacities they actually have, when unavoidable conflicts arise, and elephants over voles, and so on.

Life-form hierarchies of value have earned a bad reputation thanks to the prevalence of the Aristotelian notion of the Great Chain of Being and the negative impact it has historically had on human-animal relations. But I emphasize that my version of the life-form hierarchy of value, because it sees animals as direct subjects of justice and because it is methodologically egalitarian, does not support oppressive treatment of animals. I also point out that actual-capacities views like Rawls' are equally effective at excluding animals or sanctioning their oppression as life-form views. Further, actual-capacities views are less egalitarian across species lines than they seem. On most such views, all and only normal adult *humans* are the still the most valuable individuals.

Next, I argue that social contract theory cannot include animals as subjects of justice. The whole point of a social contract is to reach agreement among moral equals. But not every animal is equally morally valuable – on most accounts of animal ethics, some are more valuable than others for one reason or another – on account of the capacities they have, for instance, or, as I have argued, by virtue their form of life. This means that every social contract theory must either exclude some animals on the basis of their not being moral equals in some sense (Rawls, for instance), or it can include them, but it can only do so by maintaining, falsely, that some individuals that are less valuable than others are in fact equally valuable (Rowlands, for instance). Unlike social contract theory, however, I argue that my capabilities approach is able to include animals as direct

subjects of justice while acknowledging that some animals are more valuable than others, and that human individuals take moral priority.

In the last section, I incorporate Palmer's causal-vulnerability account of moral responsibilities toward animals into my version of the capabilities approach. Nussbaum holds that since each animal is equally a subject of justice, each is owed the same threshold opportunity to flourish. This means that our moral responsibilities toward domesticated animals are essentially the same as our moral responsibilities toward wild animals living 'in the wild.' Hence, although we should be careful not to do more harm than good in modifying wild animal habitats, we ought to work over time to make nature just. Similarly, Singer argues that we would likewise cause more suffering than we averted if we were to engage in large-scale intervention in nature. So we ought to leave wild animals living 'in the wild' be. Regan, on the other hand, argues that we ought to leave wild animals be, even when they harm one another, since this is not a moral matter unless a moral agent is doing the harming, and wild animals are not moral agents. I argue however that Regan's and Singer's own theoretical commitments actually support the conclusion that we ought to engage in widespread intervention in nature, just as Nussbaum's account does.

In contrast to these approaches, following Palmer, I argue that justice requires different things depending upon the ways in which we have made animals vulnerable to harm. Justice is concerned with regulating our [*human*] actions, not animals' actions. It is concerned with ensuring that *we* do not get in the way of flourishing. When we make animals vulnerable to harm, say, by breeding domesticated individuals that cannot survive 'in the wild,' or by holding a wild animal in captivity, or by damaging wild

animal habitats, and so on, we are responsible for the harm that they suffer that they would not have suffered had we not made them vulnerable in these ways. Therefore, we ought to care for the animals we have made vulnerable so that they are not harmed as a result, and we ought not to make animals vulnerable unless we are able and willing to care for them.

The laissez-faire intuition is therefore explained on my capabilities approach just as it is on Palmer's deontological approach: We have made domesticated animals and wild animals that are being kept in captivity vulnerable to harm in ways that wild animals living in the wild are not. In particular, we have made them dependent on us to meet their basic needs and in order to flourish in ways that require frequent and regular, relatively intimate human-animal interactions. We have not made wild animals living in the wild dependent on us to meet their basic needs or to flourish in this way. The responsibilities we have to care for wild animals living in the wild are therefore quite different, though no less pressing. They involve not harming wild animals living in the wild and preserving or rehabilitating adequate quantity and quality of habitats so that they can survive and flourish. I end by considering the role that individuals, collectives of various kinds, and Western liberal governments ought to play in ensuring that the animals we⁵ have made vulnerable are treated justly.

From the totality of the arguments I have presented in my project, I conclude that my own version of the capabilities approach provides a better framework within which to see animals as subjects of justice than Nussbaum's version, than Regan's animal rights

5. This general 'we' is not meant to implicate every human person in every mistreatment of animals that takes place in a given society, but to refer to the fact that every animal that has been made vulnerable in the relevant sense has been made vulnerable by a *human* being or a *human* collective or a *human* society. And therefore, some individual or collective or society as a whole, as the case may be, is morally responsible for the harm that might result from that vulnerability.

or Singer's animal welfare theory, or than any social contract theory can in Western liberal societies.

CHAPTER 2

MARTHA NUSSBAUM'S CAPABILITIES APPROACH AND ANIMALS

ABSTRACT

In my project I argue that my version of the capabilities approach provides a better framework for including animals as subjects of justice in Western liberal societies than Martha Nussbaum's version of the approach, Tom Regan's animal rights, Peter Singer's animal welfare, or any social contract theory. I first lay out Nussbaum's capabilities approach. Then I examine several versions of the social contract, highlighting a number of reasons that animals cannot be included as subjects of justice on a social contract theory. After this I consider Regan's animal rights and Singer's animal welfare accounts, as well as Val Plumwood's egalitarian account of the intentional other, Mary Midgley's affective account, and Clare Palmer's causal history account of our responsibilities toward animals. Drawing on Plumwood's and Palmer's work, in the last section, I craft a version of the capabilities approach that departs radically from Nussbaum's version in two ways. First, on my approach, individuals are valuable by virtue of their form of life, rather than by virtue of the capacities they actually have. Second, following Palmer, I hold that our responsibilities toward them are partly determined by the ways in which we have made them vulnerable to harm, rather than only by the overriding moral directive to provide every individual the opportunity to flourish. I argue that these components of my account enable it to avoid critical problems

that Nussbaum's account, Regan's animal rights, Singer's animal welfare, and social contract theories cannot.

The capabilities approach is a framework for understanding questions of justice that includes the following ideas at its core: (1) *it is good* for individuals to flourish as the kinds of beings they are, (2), it is therefore good for individuals to have the opportunity to flourish – that is, it is good for them to have those opportunities for doing and being that are essential for their form of life, (3), blocking individuals’ opportunity to flourish – what the approach calls *harm* – *is not good*, and (4), the proper object of justice is the opportunity to flourish. The approach takes its name from the opportunities for doing and being that are essential for flourishing – what it calls the central *capabilities*.

Martha Nussbaum has done more than any other author to develop the capabilities approach as a philosophical approach to questions of justice. So it is worth taking a close look at her version of the approach to start off. In this chapter I first consider the philosophical foundation, theoretical structure, and political justification for the approach as these apply to human beings. Next I consider these elements of the approach as they apply to nonhuman animals. In the process, I draw attention to certain parts of the approach and of its application that I will later scrutinize more closely as a part of my overarching argument.

A. The Philosophical Foundation of Nussbaum’s Capabilities Approach

Nussbaum’s capabilities approach begins with the idea that it is good for complex forms of life to flourish. This idea is associated with the ability of complex forms of life to inspire wonder in human observers. “If we feel wonder at looking at a complex organism, that wonder at least suggests the idea that it is good for that being to persist and

flourish as the kind of being it is.”⁶ By this she does not mean that the good of flourishing is grounded in a sense of wonder, as authors like Ramona Ileá have thought.⁷ Rather, Nussbaum thinks wonder points the way toward the morally considerable. As she puts it in *Upheavals*, “wonder does often play a very important role in marking the world for our concern, and thence in directing our attention to the suffering of its members.”⁸

From the idea that it is good for complex forms of life to flourish, Nussbaum infers that it is good for such forms of life to have the opportunity to flourish. This is the intuitive foundation in Nussbaum’s reasoning: “There are waste and tragedy when a living creature with the innate or “basic” capability for some functions that are evaluated as important and good never gets the opportunity to perform those functions.”⁹ Nussbaum maintains that this intuition includes the idea that individuals of different species are ends in themselves in the Kantian sense, i.e., that they have unconditional standing. Because it is good for living creatures that have a function to have the opportunity to flourish, and because each has unconditional standing, each ought to have that opportunity.

But it is not immediately clear whose responsibility it is to provide the opportunity. Nussbaum takes it as uncontroversial that the purpose of government is to make “people able to pursue a dignified and minimally flourishing life”¹⁰ (and ultimately

6. Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, Cambridge: Harvard University Press, 2006, 349.

7. See Ramona Ileá, “Nussbaum’s Capabilities Approach and Nonhuman Animals: Theory and Public Policy,” In *Journal of Social Philosophy*, Vol. 39 No. 4 (Winter 2008): 547 – 563.

8. Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions*, Cambridge University Press: New York, 2001, 322.

9. Nussbaum, *Frontiers*, 346-47.

10. Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach*, Cambridge: The Belknap Press of Harvard University, 2011, 33.

to do this for animals as well). This assumption is not uncontroversial outside of liberal circles. Nevertheless, the presuppositions of liberalism are so deeply embedded in the thought processes of those living in Western cultures that it is unlikely that any nonliberal theory of justice can successfully be implemented in these societies. So it is well worth the effort to continue working within the tradition to see what it has to offer. Throughout my project I will assume that Nussbaum's liberal understanding of the purpose of government is a strong contender.

Nussbaum uses the concept of dignity to classify individuals as subjects of justice, to identify individuals for whom justice is an achieved state, and to articulate the goal of justice in accordance with her grounding moral intuition. To say that an individual *has dignity* is to say that the individual has unconditional standing and that it is good for the individual to function as the kind of being it is. Having this dignity is the only requirement for being a subject of justice. To say that an individual *has a life worthy of dignity* or *has a dignified life* is to say that the individual has the opportunity to function as the kind of being it is. Justice is an achieved state for individuals that have such a life, and ensuring that each individual that has dignity also has a dignified life is the aim of justice.¹¹

Drawing on Aristotle and Sidgwick, Nussbaum advocates a particular kind of ethical inquiry. First, we imagine individual lives with the aid of narrative stories that make the lived experience of others as vivid as possible from our own perspective. Nussbaum calls this *sympathetic imagining*. We then scrutinize these imaginings together with our most deeply held moral judgments and intuitions, what Rawls calls our

11. Nussbaum, *Frontiers*, 74 – 75.

considered judgments. We do this in order to determine how they might fit into an overall moral theory and what such a theory might look like. “Nothing is held fixed in advance.”¹² We then revise theory and judgment as the case may be, until a state of good internal fit and consistency between them is achieved, what Rawls calls reflective equilibrium.

Nussbaum maintains that this kind of ethical inquiry brings us to a conception of what is essential for a life of dignity that is deeply self-validating. Human beings, for instance, are highly social, or in Aristotelian terms, political beings. To use Nussbaum’s example, a being that in every way resembles a human being but typically flourishes without social interaction – like the Cyclopes from Homer’s *Odyssey* – is not a *human* being. This judgment entails the idea that a part of what is important for a good human life is having sufficient opportunity for social interaction. She further insists that this “‘argument’ is self-validating in a deep way; you cannot withdraw your assent from its conclusion, without withdrawing from the entire form of life that, as a procedure, it embodies.”¹³

Nussbaum sees herself as being in dialogue with fellow members of the human community, i.e., her readers. She is inviting them to reject her account of what is essential for human flourishing, if they can do so without also denying some part of what *they* see as essential. Thus she hopes to further the process of reasoning toward reflective equilibrium. But she thinks that on a sufficient level of generality, we won’t be able to

12. Nussbaum, *Frontiers*, 353.

13. Nussbaum, “Aristotle on Human Nature and the Foundations of Ethics,” In *World, Mind, and Ethics: Essays on the Ethical Philosophy of Bernard Williams*. Cambridge: Cambridge University Press, 1995, 98.

self-consistently deny any of the capabilities she argues are essential for human flourishing, nor any of the basic human experiences that underlie them.

Judging which capabilities are essential for human flourishing is not just a matter of listing the capabilities human beings typically have. It is thoroughly evaluative. Human beings typically have the capacity to be cruel, for instance. But Nussbaum judges that this capacity is not essential for flourishing.¹⁴ She doesn't explain why she thinks it is not essential, but it is not hard to see why she might. According to Nussbaum, human beings are social beings with a capacity for benevolence and justice. Cruelty is entirely contrary to these capacities in that it robs both victim and arguably perpetrator of an adequate level of a multitude of capabilities that are judged essential to human flourishing (bodily integrity, senses, imagination, and thought, emotions, for instance). Hence, a being that typically flourishes by being cruel, whatever it is, is not a human being. This judgment entails the idea that a part of what is good in human life is being free from the threat of cruelty.

Nussbaum proposes a list of central capabilities without which she thinks a life worthy of dignity would not be possible: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment. She sees this list as subject to revision in light of further public reasoning and as a basis for constitutional guarantees, and she intends her capabilities approach to provide only a partial, minimal account of justice: Central capabilities need only be secured up to a minimum threshold level, a level below which

14. Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach*, Cambridge: Cambridge University Press, 2000, 83.

we judge that a dignified life is not possible.¹⁵ Anything that blocks these capabilities or diminishes them below the minimum threshold is a harm and anything that promotes them up to that threshold is a good.

Nussbaum thinks practical reason and affiliation are especially important items on the list because “they both organize and suffuse all the others, making their pursuit truly human.”¹⁶ In this she follows Marx and Aristotle. She mentions Marx’s example of a starving person: “A starving person doesn’t use food in a fully human way – by which I think he means a way infused with practical reasoning and sociability. He or she just grabs at the food in order to survive, and the many social and rational ingredients of human feeding can’t make their appearance.”¹⁷ She further emphasizes that “the dignity of the human being is the dignity of a needy, enmattered being”, not a ghostly immaterial rationality.¹⁸ Finally, Nussbaum insists that items on the list must be secured up to the threshold level regardless of whether the individual desires them or experiences their absence as a loss. If an individual who is receiving humiliating treatment does not understand that she is being humiliated, or feel negatively at all about it, she is nevertheless suffering injustice.

15. Because her account says nothing about distribution of opportunities above the minimum threshold, Nussbaum maintains that it is compatible with a variety of possible distributions of opportunities above that threshold.

16. Nussbaum, *W & HD*, 82.

17. Nussbaum, *W & HD*, 72.

18. Nussbaum, *Frontiers*, 278.

B. Contained Consequentialism

Most of the time, Nussbaum reasons within the framework provided by the Aristotelian and Kantian elements of her theory. This framework constitutes her ideal theory, her theory of how the world would have to be organized in order for it to be fully just. She thinks we ought to work to secure the vision of justice described in her ideal theory: “Any failure to secure a capability at a minimum level is a failure of justice, and we should work for a world in which those conflicts do not occur.”¹⁹

But although we should work to secure ideal justice over the long run, Nussbaum also thinks that at this point in time, it is not possible to secure each individual of each species all the central capabilities up to the minimum threshold. In order to minimize injustice in the short-term, she embraces what I call *contained consequentialism*.²⁰ While capabilities theorists “do want political principles to focus on consequences, we need to assign them a task more limited than that assigned them by the consequentialist, that of dealing with a limited range of consequences in areas that are matters of basic justice.”²¹ We should consider *only* the effects of an action on individual’s central capabilities, and consider these effects *only* up to the minimum threshold level. If we would do less harm than good by taking an action, i.e., if we would bring about less injustice than we would stop or prevent, then we ought to take the action. If not, then we ought not.

One might object that Nussbaum’s use of consequentialist reasoning is problematic because it inevitably requires harming some individuals or depriving them of

19. Nussbaum, *Frontiers*, 381.

20. Thanks to Victoria Davion for suggesting this terminology.

21. Nussbaum, *Frontiers*, 342.

a needed capability(s) so that others may not be harmed or may be less harmed. It requires doing exactly what the capabilities approach cannot countenance – the sacrifice of some individuals’ dignity for others’. By endorsing the sacrifice of some individuals’ dignity for others’, Nussbaum in fact prioritizes consequentialist reasoning over her commitment to inviolability of individuals.

This objection is based on a mistaken understanding of the relationship between the consequentialist and other elements in Nussbaum’s theory. If, as the objection contends, the inviolability of individuals were subordinated to the consequentialist judgment, then the action that minimizes harm *would be just*. But Nussbaum does not say this. Instead, she is adamant that the action that minimizes harm, although it is the best possible action, *is nevertheless unjust*. Only actions that produce no harm at all are *just*. As Nussbaum puts it, “any failure to secure a capability at a minimum level is a failure of justice...”²² The Kantian element therefore remains the ultimate measure of whether something is just on Nussbaum’s account.

C. Kinds of Capabilities, Autonomy, Equality, and Functioning

Nussbaum distinguishes between basic and internal capabilities and what she calls combined capabilities. Basic capabilities are “the innate equipment of individuals that is the necessary basis for developing the more advanced capabilities, and a ground of moral concern.”²³ These are capabilities like seeing and hearing, as well as emotional and reasoning capabilities that might be developed into fully human functioning if properly

22. Nussbaum, *Frontiers*, 381.

23. Nussbaum, *W & HD*, 84.

stimulated. Internal capabilities are “developed states of the person herself that are, so far as the person herself is concerned, sufficient conditions for the exercise of requisite functions.” They usually “take much support from the material and social world” to develop.²⁴

Combined capabilities are “internal capabilities *combined with* suitable external conditions for the exercise of function.”²⁵ Internal capabilities can be secured without securing combined capabilities. One who has the ability to speak freely, but who lives in a country where doing so may be severely punished, for instance, has the internal capabilities of freedom of speech, but not the combined capability. The central capabilities are combined capabilities that have been evaluated as essential for a dignified life. Promoting central capabilities as a matter of justice therefore entails promoting internal capabilities, as well as supplying the external conditions necessary to avail oneself of one’s internal capabilities. It also requires nondiscrimination and promoting a level of material equality that involves more redistribution than is already present in most societies. Nussbaum leaves open for debate whether redistribution should be completely egalitarian, the Rawlsian variety, or satisfy some basic social minimum.²⁶

Nussbaum sees her theory as a variety of human rights approach. The central capabilities can be seen as political rights in a nontechnical sense of the term, i.e., as protections to which each individual is entitled as a matter of justice. The distinction is often drawn between “negative” and “positive” rights, the former being protections

24. Nussbaum, *W & HD*, 84.

25. Nussbaum, *W & HD*, 84 – 85.

26. Nussbaum, *W & HD*, 85 – 86.

against impediments to individuals' pursuit of their own good, and the latter being positive provisions for individuals' pursuit of their own good. "Negative" rights are often seen as essential and inviolable, whereas "positive" rights are seen as supererogatory at best and non-existent at worst.

Nussbaum rightly rejects this classification of rights. "The capabilities approach...understands the securing of a right as an affirmative task"²⁷, whether or not it is conceived as a "negative" or a "positive" right on the common classification scheme described above. Both require positive provisions for an individual's pursuit of her own good. Consider two of the central capabilities, health and bodily integrity. The "positive" right to adequate access to healthcare takes money and resources to secure, but so does the "negative" right against harm to one's bodily integrity. A well-trained and effective police force is not inexpensive or easy to maintain.

Nussbaum, like Rawls, thinks that reasonable people can disagree on the most basic metaphysical foundations of their conceptions of the good, and it is obvious that in most modern democracies, citizens affirm a multitude of such conceptions. Rawls sees rational capacity, the capacity to develop or arrive at these conceptions of the good, and to plan one's life in accordance with them, as one of the two moral powers of persons that are required for them to agree to fair terms of cooperation. Along with affiliation,²⁸ Nussbaum also sees this capacity, which she calls practical reason, as especially important for human flourishing.²⁹ Because practical reason is a central capability that

27. Nussbaum, *Frontiers*, 287.

28. See section A of this chapter for a discussion of the importance of the central capability of affiliation.

29. Nussbaum's conception of practical reason is broader than Rawls' conception of that capacity. Rawls is referring to a higher-order Kantian capacity for ordering one's life in accordance with chosen

plays an architectonic role in shaping the other capabilities, it is especially important that justice respect different citizens' pursuit of their own conceptions of the good.

Nussbaum's capabilities approach respects different citizens' pursuit of their own conceptions of the good by [for the most part] guaranteeing opportunities for activity or being, rather than requiring individuals to act and to be in particular ways. Justice, for instance, requires that an individual have the opportunity for stimulation of the senses and of the imagination and thought, not that one actually chooses to engage in activities that stimulate these things. One may choose to live a life of sensory deprivation or refuse to read or avoid opportunities to learn new things, rather than exercising the capability of senses, imagination, and thought up to the threshold level.³⁰

But Nussbaum also thinks there are some cases in which actual functioning rather than the opportunity to function is necessary for a life of dignity, and therefore, is the appropriate political goal. Functioning rather than opportunity is the appropriate goal "wherever the individual's capacity for choice and autonomy is compromised."³¹ She thinks children are the most obvious example. For them, being able to respond appropriately to one's external environment so as to build combined capabilities out of internal capabilities requires that "primary and secondary education, health, emotional well-being, bodily integrity, and dignity" be guaranteed. It shouldn't be left up to them whether to acquire combined capabilities, since these are required for flourishing, yet

ends, including moral ends. Nussbaum is referring to these things in the case of human beings, as well as simpler capacities such as the capacity to reason about how to acquire food or to approach a potential mate in the case of animals. But the higher-order human reasoning is what both authors have in mind for the purposes of current discussion.

30. Nussbaum, *Creating Capabilities*, 39.

31. Nussbaum, *Frontiers*, 375.

children would often choose not to do what is necessary to develop them if given the choice. We ought also, for the same reason, restrict choice in cognitively impaired adults.³²

Moreover, there are some capabilities that can only be secured sufficiently for a life of dignity if they are secured equally across individuals, rather than simply up to an adequate threshold level. These include the “social bases of self-respect and nonhumiliation;” being able to be treated as a dignified being whose worth is equal to that of others;” and religious, political, and civil liberties.³³ If some individuals had greater religious liberty than others, for instance, those with the lesser religious liberty would be denied dignity by the very fact that they have lesser religious liberty.

D. Political Justification

Nussbaum’s account of political justification can be summarized as follows: She (1) keeps the idea of reasoning toward a reflective equilibrium but sees its role in political justification as secondary, (2) keeps an ancillary role for informed preferences, and (3) keeps the idea of the possibility of an overlapping consensus but applies it only to the capabilities themselves and sees its role in political justification as primary, modifying her understanding of it to make it inclusive of a wider variety of comprehensive doctrines.

The moral intuition that it is good for complex forms of life to have the opportunity to flourish is the philosophical ground for Nussbaum’s capabilities approach.

32. Nussbaum, *W & HD*, 90.

33. Nussbaum, “The Capabilities Of People With Cognitive Disabilites,” In *Metaphilosophy*, Vol. 40, Nos. 3-4 (July 2009), 335.

She uses the kind of self-validating reasoning and argument toward reflective equilibrium that I outlined in section of A of this chapter to construct her list of central capabilities upon this philosophical ground. Nussbaum thinks that there can be no stronger a political justification than if all or most citizens shared the very same reasons for constructing the list. But although she thinks this is possible, she does not believe that it is likely to happen. She notes that political justification is ongoing and wide reflective equilibrium unlikely, and that under pluralism, “other *political* conceptions still have strong backing.”³⁴ Hence, she turns to other means for politically justifying the capabilities list.

To this end, Nussbaum argues that citizens’ informed desires play an ancillary role in justifying the capabilities list. But the primary form of political justification that she puts forward, to actually get the job done so to speak, is the possibility of a Rawlsian overlapping consensus.³⁵ A Rawlsian overlapping consensus is a consensus, held among rational and reasonable individuals in a society characterized by reasonable pluralism, endorsing a particular political conception for reasons located within their own respective conceptions of the good. The idea is that if we can endorse a particular political conception, each for our own reasons derived from our own metaphysical commitments, then that conception obtains legitimacy by respecting citizens’ autonomy. It also gives us reason to believe the political conception can remain stable over time. Importantly,

34. Nussbaum, *W & HD*, 103.

35. Allison M. Jaggar interprets Nussbaum as having abandoned her earlier Aristotelian-style self-validating reasoning in her more recent work. I do not think Nussbaum has abandoned it, but rather, that she has placed it within a framework of other justifications that play a weightier role in political justification. The self-validating reasoning is Nussbaum’s favored method of testing her intuitions in reasoning toward a reflective equilibrium. But she remains open to revision of this method as with all aspects of her theory. That is to say, she is not, as Jaggar claims she is, dogmatic about this fundamental element of her reasoning process (See “Reasoning Well About Well-Being: Nussbaum’s Methods of Justifying the Capabilities”, In *The Journal of Political Philosophy*. 14: 3, 2006).

Rawls' overlapping consensus is on his entire political conception – the principles of justice, the contract procedure, and the reasoning process through which the procedure was designed – whereas Nussbaum's is only on the central capabilities qua political entitlements.

Nussbaum also rejects the Rawls' use of the concept of reasonableness. For Rawls, reasonable persons are those whose comprehensive doctrines are shaped by conscientious, careful reasoning, and whose conceptions of the good are on the whole coherent, consistent, and intelligible.³⁶ But Nussbaum argues that the theoretical constraints Rawls places on what reasoning should be considered "reasonable" are needlessly exclusionary because they allow "public denigration of a group of comprehensive doctrines that from the point of view of the ethical aims of the political conception, are unproblematic."³⁷ Common doctrines of the Trinity in Christianity, for instance, are neither coherent nor consistent, but their mystery and seeming paradox are at the very heart of the faith. And individuals whose conceptions of the good emphasize autonomy and contain little theoretical structure would likewise be considered unreasonable. But, Nussbaum points out, those who hold these conceptions and others like them can and often do show the necessary respect for others who do not share their views.

Nussbaum maintains that what makes a comprehensive doctrine reasonable is that it is compatible with the thin moral constraints of a conception of justice. The Rawlsian epistemic and theoretical criteria of coherence, consistency, and intelligibility must be

36. Nussbaum, Martha C. "Perfectionist Liberalism and Political Liberalism," In *Philosophy & Public Affairs*. 39: 1, 2011, 25.

37. Nussbaum, "Perfectionist Liberalism...", 28.

dropped. The state may then criticize doctrines that advocate slavery or the oppression of women because they are incompatible with the thin moral constraints of a conception of justice. But it may not denigrate doctrines that are compatible with these thin moral constraints, however irrational or foolish these doctrines might appear. Nussbaum's rejection of epistemic and theoretical criteria for reasonableness and her endorsement of a thin moral conception of reasonableness in their stead allows her to include a far greater diversity of comprehensive views in an overlapping consensus than Rawls could manage.

The idea that "all citizens...should have a minimum threshold amount of the ten capabilities"³⁸ is one that Nussbaum thinks the adherents of most comprehensive doctrines can endorse. She thinks this because what is truly contentious about conceptions of the good across cultures is the metaphysical commitments and first principles that are assigned a necessary or prominent place in those conceptions. When we steer clear of these metaphysical commitments and first principles, both atheist and theist alike (with some exceptions) could affirm the opportunity for individuals to decide for themselves what to believe in these areas, seeing the choice itself as very important for human flourishing, or at least seeing the dangers of restricting such freedom as too great to justify restricting it.

As I see it, it is doubtful whether a Rawlsian overlapping consensus on the central capabilities is possible outside of Western liberal societies. People who live in a Western liberal culture are more likely to share Nussbaum's intuitions about justice, especially about the importance of practical reason and individual autonomy. But it is not clear that people who have a different political culture will be able to reach such a consensus. On

38. Nussbaum, *Creating Capabilities*, 92 – 93.

this point I differ from Nussbaum about the range of *kinds of* societies in which her capabilities approach can be fruitfully applied. I will therefore confine my examination and critique of her approach to Western liberal societies going forward.

E. From Human Beings to Nonhuman Animals

Nussbaum holds that “the idea of social justice is inherently bound up with at least minimal sentience...and with the accompanying capacity for some type of agency.”³⁹ For this reason, she thinks the focus of justice should be on “the well-being and dignity of the individual creature.”⁴⁰ She also thinks that entities that lack either of these capacities are not subjects of justice. Ecosystems, for instance, are not subjects of justice because they do not appear to have a plan for life or striving. She does, however, argue that sentient animals are subjects of justice for the same reason human beings are: They are complex beings that have a good of their own toward which they strive, and hence, a kind of dignity that inspires wonder and ought to be respected.⁴¹

In Western liberal societies, among those who are actively engaged in reasoning toward reflective equilibrium, i.e., the community of those concerned with elucidating a valid philosophical ground for a theory of justice, the intuition that sentient animals are subjects of justice is widespread. Thus, for the purposes of developing a theory of justice

39. Nussbaum, *Creating Capabilities*, 158. Jeremy Bendik-Keymer, in a forthcoming article, has argued that sentience and the capacity for agency are already implicit as necessary criteria for being a subject of justice in *Frontiers* (“From Humans to All Life: Nussbaum’s Transformation of Dignity,” In *Capabilities, Gender, Equality: Towards Fundamental Entitlements* (New York: Cambridge University Press), Forthcoming, 10 – 14). But I read Nussbaum as having been noncommittal on this question in *Frontiers*, whereas in *Creating Capabilities*, she has clearly committed to these criteria.

40. Nussbaum, *Frontiers*, 357.

41. Nussbaum also suggests that considerations of justice might extend through generations of animals and that something like Rawls’ just savings principle might be adopted in their case, although she does not develop this idea.

for Western liberal societies, the task with which I am concerned here, Nussbaum's capabilities approach remains a serious contender. I emphasize that I am not claiming that Western liberal societies are in any way superior to other kinds of societies. I am only explaining why I think Nussbaum's capabilities approach provides a promising framework for justice in Western liberal societies.

For Nussbaum, the just treatment of an individual animal, as in the human case, is treatment that ensures up to a minimum threshold those capabilities without which it could not flourish. Not every animal has the same set of central capabilities. It makes no sense to say that animals are entitled to capabilities they do not have, and differences in capability among animals fall most regularly along species lines. Hence, we should begin the task of determining which capabilities an animal is entitled to by determining which capabilities members of its species typically have.⁴²

As human beings, "a no-evaluation view, which extracts norms directly from observation of animals' characteristic ways of life, is probably not going to be a helpful way of promoting the good of animals."⁴³ We must evaluate the characteristic ways of life of different species in order to determine which capabilities are essential.⁴⁴ For this we use the same process of sympathetic imagination plus rational scrutiny aimed at reflective equilibrium that Nussbaum describes for the human case. With each step we keep in mind that "All descriptions of animal behavior are in human language, mediated

42. Nussbaum, *Frontiers*, 365.

43. Nussbaum, *Frontiers*, 369.

44 Nussbaum, *Frontiers*, 347.

by human experience.”⁴⁵ Human experience, in turn, is structured by epistemic frameworks though which we see the world.

Much work has been done in feminist epistemology regarding the obstacles these frameworks can pose to pursuing justice when they are not sufficiently open to other frameworks, particularly those held by oppressed groups.⁴⁶ Some individuals knowingly hold demonstrably false beliefs about oppressed groups, while others have these beliefs but do not ever reflect upon them, and so act in ways that help to perpetuate oppression without ever even realizing it. Still others seek to act in ways that undermine oppressive social frameworks but end up helping to perpetuate them anyway. Yet the effort to act in ways that undermine oppressive social frameworks in the human context, even if not entirely successful, is extremely important.

The same is true in our evaluation of animal lives: We must do our best not to read into their lives’ our preconceived notions about how they flourish and the way their lives ought to go. Reflection ought to flow not from armchair reflection, but from close engagement with the latest biological and ethological literature and from personal interactions with animals. And it must consider the ways in which those who are concerned with the good of animals but who don’t study and work in the area of animal ethics think about their intentionality.

Nussbaum proposes a list of central animal capabilities that includes each of the ten items on the human list. It is intended to serve as a guide in developing a plurality of lists for different species, each describing a distinct kind of dignity. The list appears in its

45. Nussbaum, *Frontiers*, 354.

46. See for instance the work of Lorraine Code and Allison Jaggar.

most complete form in *Frontiers*.⁴⁷ The summary of the central animal capabilities that follows is drawn from this version of the list:

1. *Life*: Animals are entitled to continue living, “whether or not they have such a conscious interest, unless and until pain and decrepitude make death no longer a harm.”⁴⁸

2. *Bodily Health*: Securing this entitlement requires, among other things, “laws banning cruel treatment and neglect; laws banning the confinement and ill treatment of animals in the meat and fur industries; laws forbidding harsh or cruel treatment for working animals, including circus animals; laws regulating zoos and aquaria, mandating adequate nutrition and space.”⁴⁹

3. *Bodily Integrity*: This entitlement includes protections against violence and cruelty, again, whether or not this kind of treatment is felt as painful by the animal. Humans are not free to manipulate the bodies of animals for trivial reasons, though Nussbaum insists that training enabling an animal “to manifest excellences that are part of its characteristic capability profile would not be eliminated.”⁵⁰ Moreover, though this capability includes reproductive and sexual freedoms for human beings, she maintains that these freedoms are not always essential for animal flourishing. In some cases, like the castration of male cats and horses, the opportunity to flourish may actually be enhanced because it makes them less aggressive and less likely to sustain injuries. Nussbaum also thinks that for animals, unlike human beings, sterilization is not a harm. It may in fact improve other animals’ lives by preventing overpopulation.

47. Nussbaum, *Frontiers*, 393 – 400.

48. Nussbaum, *Frontiers*, 393.

49. Nussbaum, *Frontiers*, 394.

50. Nussbaum, *Frontiers*, 395.

4. *Senses, Imagination, and Thought*: This capability is protected in the same way that bodily health is: “stringent laws regulating the harsh, cruel, and abusive treatment of animals, and ensuring their access to sources of pleasure, such as free movement in an environment that is such as to please their senses.”⁵¹ For some animals it will also include opportunities for education. “A border collie who is not trained has been abused, and the same is true of many breeds of horses.”⁵²

5. *Emotions*: Animals are entitled to opportunities to experience the emotions they are capable of, minus those opportunities that would be harmful to their psychological or physical health. These include simple emotions, such as fear, anger, joy, and gratitude, as well as more complex emotions such as compassion in more cognitively complex animals. Animals are entitled to “lives in which it is open to them to have attachments to others, to love and care for others, and not to have those attachments warped by enforced isolation or the deliberate infliction of fear.”⁵³

6. *Practical Reason*: Animals are entitled to the capacity to organize their lives as they see fit, to the extent that they are able to do so. The capacity is clearly more limited in animals than in human beings. “To the extent that this capacity is present, it ought to be supported, and this support requires many of the same policies already suggested by Capability 4: plenty of room to move around, opportunities for a variety of activities.”⁵⁴

7. *Affiliation*. “Animals are entitled to opportunities to...engage in characteristic forms of bonding and interrelationship [and to] relations with humans, where humans

51. Nussbaum, *Frontiers*, 396.

52. Nussbaum, *Frontiers*, 397.

53. Nussbaum, *Frontiers*, 397.

54. Nussbaum, *Frontiers*, 398.

enter the picture, that are rewarding and reciprocal rather than tyrannical.”⁵⁵ This includes protection from humiliating treatment whether or not they feel it as humiliating.

Characteristic forms of bonding and interrelationship that are harmful to those involved, where these relationships are not otherwise essential for “the economy of species life”,⁵⁶ are not protected. This means stopping attacks on infants, on the sick and the elderly, that are common in many species. But though they may sometimes be moderated, hierarchy and inequality are fundamental enough to some species functioning that they cannot be entirely removed without doing more harm than good.⁵⁷

8. *Other Species*. Animals are entitled to “live with concern for and in relation to animals, plants, and the world of nature.”⁵⁸ Relations in nature are not mutually supportive. But they must be if justice is to obtain. Hence, this capability “calls, in a very general way, for the gradual supplanting of the natural by the just.”⁵⁹

9. *Play*. Animals must be given the opportunity for rest and recreation. This capability “calls for many of the same policies we have already discussed: protection of adequate space, light, and sensory stimulation in living places, and, above all, the presence of other species members.”⁶⁰

10. *Control Over One’s Environment*. Animals are entitled to a political conception that preserves their dignity. Animals cannot represent themselves, but are

55. Nussbaum, *Frontiers*, 398.

56. Nussbaum, *Frontiers*, 399.

57. Nussbaum, *W & HD*, 94.

58. Nussbaum, *Frontiers*, 399.

59. Nussbaum, *Frontiers*, 400.

60. Nussbaum, *Frontiers*, 400.

entitled to representation by human beings when their capabilities are threatened. They are also materially entitled to the opportunity to maintain territories (on analogy to human property rights) and reasonable working conditions (on analogy to human workers' rights).

Nussbaum anticipates an objection to her use of the species norm in determining what treatment is owed to individuals. Utilitarians and authors like James Rachels argue that proper moral consideration of individuals requires seeing them as *sui generis* beings that may have more in common with particular members of other species than with most members of their own species. Seeking to mold individuals into the species norm will often prevent us from maximizing happiness and can be harmful. But Nussbaum insists that focusing on the individual as a unique being fails to recognize the relevance of community membership and the context of the species norm.

If a human being is severely cognitively impaired such that her mental abilities are similar to those of a mentally normal adult Chimpanzee, she must nevertheless be cared for in a loving human community, not in a community of Chimpanzees. Likewise, a mentally normal adult Chimpanzee ought to have the opportunities for affiliation that are essential for her flourishing as a Chimpanzee, not those essential for her flourishing as a human being in a human community. Nussbaum insists that individuals who lack the capacity to reach the minimum threshold of one or more species-defined central capabilities are nevertheless entitled to the opportunity to fulfill those capabilities up to whatever level they are capable of achieving.

Nussbaum also draws some general conclusions about which animals are subjects of justice and how easily harmed they are in light of her evaluation of animal lives. She

maintains with Rachels and Singer that the potential harm which can be done to animals with comparatively many capabilities is greater than that which can be done to animals with comparatively few capabilities because the former have more capabilities which can be denied. This differential potential for harm can be clearly seen in a comparison of the painless death of differently sentient organisms. More harm can be done by killing a [complexly sentient] person, for instance, than could possibly be done by killing a [minimally sentient] fish. This is because the former has many capabilities that would be frustrated by such killing, whereas the latter arguably has “only opportunities for enjoyment and movement.”⁶¹

Nussbaum insists that she is not advocating an Aristotelian-style hierarchy of value by adopting this view of the relative value of individuals.⁶² Since her account grounds the relative value of individuals in the capacities individuals have as individuals, rather than in the capacities they ought to have as members of a given kind or species, I agree that she avoids such a hierarchy and the problems that are commonly associated with it.

Nevertheless, in the final chapter I will argue that Nussbaum’s way of grounding the differential value of individuals – in the capacities they actually have – is not the best way to ground the differential value of individuals. The central problem that Nussbaum’s account faces – that she shares in common with other capacities views – is that her account entails the conclusion that severely cognitively impaired individuals are worth less than normally functioning adult humans. In developing my own version of the capabilities approach, I argue that the right kind of life-form hierarchy of value – of a

61. Nussbaum, *Frontiers*, 386 - 87.

62 Nussbaum, *Frontiers*, 360 – 361.

decidedly non-Aristotelian variety – can provide a better way to understand the differential value of individuals than appealing to the capacities individuals actually have. It can provide this better understanding in no small part because it sees severely cognitively impaired humans as being worth just as much as normally functioning adult humans.

F. The Question of Autonomy

Nussbaum also addresses concerns about paternalism and individual autonomy. She admits that there is some truth to the claim that species autonomy, defined as an individual's freedom to "...settle certain very important matters on its own, without human intervention,"⁶³ is an important part of animal flourishing. Moreover, in her discussion of the need to give material aid to animals "in the wild"⁶⁴ suffering from disease or natural disaster, Nussbaum argues that although we should render aid, we should also try to preserve autonomy. She further claims that "it would [therefore] be a bad result if all animals ended up in zoos, completely dependent on human relations."⁶⁵

But Nussbaum ultimately argues that because human beings have a pervasive or ubiquitous influence on animal habitats, animals' "capacity for choice and autonomy is [usually] compromised."⁶⁶ Therefore, species autonomy defined as an individual's freedom to settle certain very important matters on its own – without human intervention – does not exist. As we act paternalistically toward human children and the mentally

63. Nussbaum, *Frontiers*, 373.

64. Just what "in the wild" means for Nussbaum will be discussed in section G of this chapter.

65. Nussbaum, *Frontiers*, 375.

66. Nussbaum, *Frontiers*, 375.

disabled because their capacity for choice and autonomy is compromised, so should we act paternalistically toward animals because their capacity for choice and autonomy is compromised. Nussbaum thinks that we can balance our paternalistic concern with our concern for species autonomy by adopting what she calls “intelligent paternalism.” Intelligent paternalism provides opportunities for individuals to choose in ways that are required for them to flourish, but need not provide opportunities to choose in other ways.

I agree with Nussbaum’s intelligent paternalism. The strong conception of autonomy she argues against holds that for at least some animals, opportunities for choice that are directly sustained or created by human beings are in some way corrupted or counterfeit spaces for choice. These human-sustained or created spaces for choice are seen as corrupted or counterfeit not because of any failure of human beings to provide the spaces, but precisely because human beings are the ones providing them. This view builds on a mistaken separation between human beings and “nature” that sees human agency and influence as defiling the “purity” of nature. However, I do not think that intelligent paternalism sanctions widespread intervention in nature as Nussbaum does (see chapter 6).

G. Animals, Overlapping Consensus, and Threshold Levels

Nussbaum further argues that although many conceptions of the good view animals as metaphysically lower than human beings, an overlapping consensus on animal entitlements is also possible. We can serve as trustees for animals, representing their interests in an overlapping consensus on animal entitlements. Trustees can give “their

own good-faith estimate of a conception of good for each animal.”⁶⁷ She thinks that relationship of animal conceptions of the good to one another will not pose any serious impediment to an overlapping consensus, since if a particular animal would never agree to certain conditions, we can impose them anyway. Predators, for instance, because they lack a sense of interspecies justice, would not likely agree to refrain from attacking prey. But if we judged that it would do less harm than good to prevent predators from killing prey, the human representatives of the predator could simply agree to restrain the predator from killing.

Nussbaum maintains that the bigger problem for obtaining a stable overlapping consensus is reaching agreement across human conceptions of the good. Here Nussbaum admits that “most of the existing religious and secular comprehensive doctrines are miles away from the positions” she argues for.⁶⁸ Nevertheless, because of their shared political culture, even people whose comprehensive doctrines exclude animals from serious moral consideration can understand the kinds of arguments Nussbaum is advancing. Because these kinds of arguments are intelligible to them, they may yet be convinced that animals are subjects of justice and change their worldviews accordingly.⁶⁹

67. Nussbaum, *Frontiers*, 389.

68. Nussbaum, *Frontiers*, 390.

69. Nussbaum is quite optimistic about the prospects for an overlapping consensus on animal capabilities. But whether we are headed toward an overlapping consensus on animal capabilities is not of direct concern. Though this will not be a central part of my argument for my capabilities approach, elements of my version of the approach, such as a suitable life-form hierarchy of value (which enables conformity with the human not-meriting intuition: see chapter 6), make an overlapping consensus on my version of the capabilities approach more plausible than an overlapping consensus on hers. This is so even though Nussbaum only claims that an overlapping consensus is possible on the central capabilities, not on her entire approach.

Nussbaum does not specify the threshold levels of capability for individuals of particular species, but maintains that the need to accommodate reasonable pluralism as well as practical considerations act as limiting factors on how high threshold levels might be set.⁷⁰ Properly specified threshold levels should therefore be high enough to guarantee each the opportunity to flourish, but not so high as to be unattainable or to prevent the formation of an overlapping consensus. Threshold levels may therefore be raised if an overlapping consensus is achieved, but for now, threshold levels should be placed to prevent cruelty and to provide better living conditions while animals are alive, rather than to prevent all killing for food or to abolish all use of animals in medical research.⁷¹

Nussbaum is right that foundational texts of common religions are on some interpretations compatible with and even supportive of animal entitlements. The question of whether people ascribing to the religions that appeal to these texts will actually adopt these interpretations and the conceptions of the good that follow from them is an empirical one. Here there is room for much skepticism. But it does look as if such a consensus is possible in politically liberal Western societies, at least in light of the shared political culture. And it is these societies for which I am concerned to argue that the capabilities approach shows much promise as an alternative to contract theories as a framework for justice for animals.

H. Ambiguous Terms and Dualisms

Nussbaum is adamant that there is no “in the wild” or “in nature,” where this means complete freedom from human influence. Nevertheless, she continues to use the

70. Nussbaum, *Frontiers*, 180.

71. Nussbaum, *Frontiers*, 402 – 403.

phrase “in the wild” and to refer to “nature,” and speaks of individuals of species often thought of as “wild” as living in or being entitled to environments sufficiently like their original habitats. By “in the wild” or “nature” she seems to mean locations that are not under direct human control or that are less influenced by human beings than other locations are.

Nussbaum uses similarly unclear terms and phrases to categorize animals into groups. By “domestic” animal, Nussbaum seems to mean, paradigmatically, individuals of a species that has evolved over time so that its members are now constitutively dependent on humans for their survival or for their flourishing. By animal “raised for food,” or “animals in research,” Nussbaum seems to mean any animal raised for food or used in research, whether or not it has evolved to become dependent upon us for its survival. What she means by “wild” animals is more ambiguous. Certainly “wild” animals are not constitutively dependent upon us for their survival. But they may or may not be under our “direct control,” and they may or may not be our companions, raised for food, or used in research. Perhaps the best way to understand what Nussbaum means by “wild” animals is this: “Wild” animals are animals that (A) are not constitutively dependent on us, and that (B) for the most part, have historically lived in environments that are not as intensively shaped or controlled by humans.

‘Domestic’ or ‘domesticated’ and ‘wild’ can be understood either as categories or as polar ends on a conceptual continuum. The continuum view seems to more accurately represent the empirical data we have on the change of various species over time in their

various relationships with human beings.⁷² So unless otherwise noted, when I talk about ‘domesticated’ and ‘wild’ animals, the reader should assume that I am referring to animals that fall closer to one or the other end of a continuum, which ends are as I have described above. It is not clear from what Nussbaum says whether she holds a categorical or a continuum-view on the matter. In the absence of clarity, I assume that Nussbaum, too, adopts a continuum view of the matter, so as to interpret her version of the capabilities approach as charitably as possible.

I. Putting The Approach Into Practice

Nussbaum’s judgments about how we ought to treat different kinds of animals as subjects of justice are grounded largely in her consequentialist strain of reasoning (see section B). Her account of what counts as a harm, which harms are greater, and for which individuals the harm of death is greater, enables us to assess the consequences of our actions to see what we should do in cases of tragic conflict. Unless individuals are suffering from irreversible pain or decrepitude, we should always try first to secure capabilities without any killing, especially if the individuals in question are complexly sentient. If this is possible, then we try to secure the capabilities by nonviolent means. If this is possible, then we try to secure the capabilities in a way that least impedes individual capabilities. Killing and violent means are only entertained if there is no other way to secure capabilities, and if the killing or violence is a lesser harm than doing nothing at all.

72. Jozef Keulartz has referred to this kind of thinking, “thinking in terms of degrees instead of boundaries,” as “gradualization” (“Boundary Work in Ecological Restoration,” In *Environmental Philosophy*, Vol. 6, No. 1 (2009), 36.

Nussbaum's judgments on what justice demands of us differ between companion animals, animals raised for food, animals raised for use in research, "wild" animals kept in captivity, and "wild" animals "in the wild." Of these groups of animals, in Western societies, peoples' beliefs about how we ought to treat companion animals come closest to what the capabilities approach demands for all animals. The law in many countries already guarantees domestic companion animals some of what is necessary for flourishing. The Animal Welfare Act in the United States, for instance, while excluding cold-blooded animals and birds from protection, protects a variety of warm-blooded mammals that are often kept as companion animals. It requires that primary enclosures for dogs and cats "provide sufficient space to allow each...to turn about freely, to stand, sit, and lie in a comfortable position, and to walk in a normal manner",⁷³ provisions for adequate food and water, shelter from the elements, freedom from violence, exercise for dogs, and so on.

These provisions are too weak in that they set threshold levels for the capabilities below the minimum level in many areas and do not even take into consideration other capabilities such as affiliation and play, or senses, imagination, and thought. These capabilities are not politically guaranteed, but peoples' sentiments toward companion animals often compel them to care for them in the other ways necessary for their flourishing. In order to bring the law into full agreement with Nussbaum's capabilities approach, these capabilities would need to be politically guaranteed and those that are already guaranteed supplied at a much higher level.

73. Animal Welfare Act Code of Federal Regulations, United States Government, § 3.6 (xi).
 <<http://www.gpo.gov/fdsys/pkg/CFR-2009-title9-vol1/xml/CFR-2009-title9-vol1-chapI-subchapA.xml>>.
 Accessed 9/18/2013, 4:56PM.

The situation is very different for animals in the other groups. Animals raised for food and for research often receive little if any political protection. Again, the Animal Welfare Act is instructive. Although most warm-blooded mammalian companion animals receive some protection, this protection does not extend to “(1)...rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber...”⁷⁴ As Nussbaum notes in her argument for the possibility of an overlapping consensus on animal capabilities, animals raised for food and for research have been receiving greater protections in recent years. But these protections still fall far short of what is needed, and those not under such protection are often raised under conditions that make flourishing impossible. There is no morally relevant difference between animals raised for food or for research and companion animals, so Nussbaum concludes that animals raised for food and for research should receive the same level of protection as companion animals.

Nevertheless, in the case of animals raised for food, Nussbaum thinks it unreasonably utopian to work to end the practice. We ought to focus instead on guaranteeing these animals the opportunity to thrive while they are alive.⁷⁵ In the case of animals raised for research, Nussbaum gives even more leeway to human interests. She claims that when alternative ways of conducting research on serious ailments affecting human beings cannot be found, and it seems reasonable to think the research will be

74. Animal Welfare Act, § 1.1. Individual states have added their own regulations to those in the Animal Welfare Act. Thus, some states have substantially more protections than others. From the point of view of Nussbaum’s capabilities approach, this uneven application of justice is problematic, since each individual is entitled to the opportunity to flourish, not only individuals in certain states.

75. Nussbaum, *Frontiers*, 402 – 403.

fruitful, we ought to continue the research, even if it brings great pain and suffering to the animals used. Though she admits that this research is unjust, she also characterizes it as an example of the “ineliminable residue of tragedy in the relationships between humans and animals.”⁷⁶

I do not think that it is unreasonably utopian to work to end the practice of raising animals for food, since the practice, at least in Western liberal countries, is typically not done out of necessity. Nor do I think that it is fair to characterize the tragedy of painful animal research as “ineliminable” or a mere “residue.” It is at the very heart of what is wrong with the way many people in Western liberal societies tend to think about animals. In chapter 6 I will argue that in most situations in Western liberal countries, there is no good reason to raise animals for food or to conduct painful research.

Further, Nussbaum thinks that “wild” animals in captivity, like animals raised for food and research, ought to be guaranteed the same opportunity to flourish as companion animals, and for the same reasons. But she does not give any arguments to justify sacrificing their capabilities for human flourishing as she does for companion animals. Instead, she focuses on the unique problems associated with guaranteeing “wild” animals’ capabilities in captivity. As discussed earlier, Nussbaum rejects the idea that even “wild” animals “in the wild” are truly autonomous. Hence, she endorses keeping “wild” animals in zoos in some cases, especially in cases when the individuals would be in danger from human activities if they were left in the “wild.”

Nussbaum thinks that domestic animals can often benefit from being taught to behave in certain ways that aren’t necessary for survival but that nevertheless are essential for flourishing. But she is adamant that for “wild” animals, such as those trained

76. Nussbaum, *Frontiers*, 404.

to perform in circuses, any training to do things that are not necessary for survival amounts to abuse.⁷⁷ Nussbaum does not say so, but her reason for thinking this seems to be that domestic animals are constitutively dependent upon human beings for their flourishing, whereas “wild” animals are not. Therefore, some of the kinds of paternalistic treatment that she judges necessary for the former’s flourishing are for the latter impediments to flourishing.

I agree that domestic animals must learn to act in certain ways in order to flourish since certain ways of acting are required in order to get along well in close quarters with humans. Training dogs to dispose of their own waste is a good example of this. But it is not clear how far this training should go. It may be that horses, for instance, really shouldn’t be taught to perform dressage, since it is not clear how their being able to do so contributes to their flourishing. Also, some wild animals may be able to flourish in captivity, but others will not. And if an animal fails to flourish in captivity, the humans who have placed the animal there are morally responsible for harming it. I will say more about this in chapter 6 as well.

Nussbaum is less confident in her judgments about how “wild” animals “living in the wild” ought to be treated as subjects of justice. She argues that many of the capabilities animals need to flourish are routinely blocked or frustrated “in the wild,” that the relationship between animals and between animals and their environment “in the wild” “is hardly harmonious.”⁷⁸ It is instead marked by frequent harms, pain, violence, and death: Individuals of the same species fight each other for dominance in power

77. Nussbaum, *Frontiers*, 325; 377 – 378.

78. Nussbaum, *Frontiers*, 367 – 68.

hierarchies, different groups of the same species fight each other for resources, diseases spread through populations, droughts lead to malnutrition or starvation, and so on.

Predator-prey relationships are probably the most vivid example of harmful relations “in the wild.” Predation is often painful, and predators routinely kill complexly sentient individuals that are not suffering from irreversible pain or decrepitude, young healthy individuals, for instance. So the harm of death is a pervasive part of predator-prey relationships.

In her elaboration of the “other species” capability, Nussbaum offers a general solution to the problem of predator-prey relationships and other unjust relations “in the wild.” Guaranteeing this capability “calls, in a very general way, for the gradual supplanting of the natural by the just.”⁷⁹ This includes the removal of harmful elements of animals’ interactions with each other. Taken together, Nussbaum’s injunction to turn nature just and her form of intelligent paternalism support such policies as placing some predators and prey into captivity in order to prevent the former from hunting the latter. They support an ongoing increase in our control over the lives of “wild” animals “in the wild,” as far as we are able to do so without doing more harm than good.

I will argue that Nussbaum is mistaken in her view of what we owe to “wild” animals “in the wild” as a matter of justice. Once we understand the proper role our relationships with other animals play in determining our responsibilities toward them (chapter 6), we will see that in most cases, we do not have a responsibility to make nature just in the way that Nussbaum suggests. In fact, the effort to do so would likely generate moral responsibilities toward wild animals that we cannot possibly fulfill.

79. Nussbaum, *Frontiers*, 399 – 400.

J. Conclusion.

In this chapter I have outlined Nussbaum's capabilities approach, its philosophical ground, theoretical elements, and its application to different groups of animals. I have also highlighted problems with certain aspects of her theory and its application, problems that I address in greater detail later. In the next chapter I will examine social contract theory as an alternative to Nussbaum's capabilities approach – looking at how different versions of the social contract deal with the question of whether animals are subjects of justice and how they ought to be treated if it holds that they are. I will withhold critical assessment of these versions of the social contract until chapter 4.

CHAPTER 3

SOCIAL CONTRACT THEORY AND ANIMALS

ABSTRACT

In my project I argue that my version of the capabilities approach provides a better framework for including animals as subjects of justice in Western liberal societies than Martha Nussbaum's version of the approach, Tom Regan's animal rights, Peter Singer's animal welfare, or any social contract theory. I first lay out Nussbaum's capabilities approach. Then I examine several versions of the social contract, highlighting a number of reasons that animals cannot be included as subjects of justice on a social contract theory. After this I consider Regan's animal rights and Singer's animal welfare accounts, as well as Val Plumwood's egalitarian account of the intentional other, Mary Midgley's affective account, and Clare Palmer's causal history account of our responsibilities toward animals. Drawing on Plumwood's and Palmer's work, in the last section, I craft a version of the capabilities approach that departs radically from Nussbaum's version in two ways. First, on my approach, individuals are valuable by virtue of their form of life, rather than by virtue of the capacities they actually have. Second, following Palmer, I hold that our responsibilities toward them are partly determined by the ways in which we have made them vulnerable to harm, rather than only by the overriding moral directive to provide every individual the opportunity to flourish. I argue that these components of my account enable it to avoid critical problems that Nussbaum's account, Regan's animal rights, Singer's animal welfare, and social contract theories cannot.

For most of Western history and for the most part, animals have not been seen as moral subjects. Or if they have, they have been seen as such only in a greatly diminished sense. So it is not surprising that classical contract theorists from the Western tradition – Hobbes, Locke, and Kant, for instance – were not terribly concerned with whether animals are subjects of justice and if so, what we would owe to them as a matter of justice. Most classical contract theorists said little about how animals would or would not figure into their respective theories.⁸⁰ What they did say indicates that animals were essentially property at their owners' disposal, and any further moral consideration was derivative upon the ill effects on humans of treating animals cruelly. This further consideration, moreover, was not tied to questions of basic justice for animals, but was usually seen as a matter of cultivating virtuous character in human beings.⁸¹

In the last century however, particularly the second half of the last century, there has been growing agreement among those working in the areas of ethics and political philosophy that the question of whether animals are subjects of justice is an important one. Hence many contemporary contract theorists, even those who dismiss the idea that animals are subjects of justice, have at least thought it important to give an account of why they think they are not. Because contemporary contract theorists have had the most to say about how contract theory can or cannot include animals as subjects of justice, a central concern of my project, I focus on these theories rather than the classical theories in my examination of whether contract theory can include animals as subjects of justice,

80. Hugo Grotius was a notable exception to this. See *On the Law of War and Peace*, Whitefish, MT: Kessinger Publishing LLC, 2010, Ch I, XI.

81. See, for instance, Immanuel Kant's Amphiboly, §16 and §17 in his *Metaphysics of Morals* (Trans. by Mary Gregor. Cambridge: Cambridge University Press, 1966 (192)).

and if so, how. I do however refer to aspects of the classical theorists' works when the subject matter calls for it.

I begin by examining the works of two social contract theorists who have argued that animals cannot be subjects of justice on a social contract – John Rawls and Peter Carruthers. I cover their accounts here because it is helpful to have them fresh in one's mind when considering arguments against them – arguments that I will outline in the next chapter. I also briefly examine T.M. Scanlon's moral contractual account. Although Scanlon's theory works with the idea of a moral and not a political contract, its normative grounds and structure are similar enough to avowedly political theories to prove insightful. Many other social contract theorists argue that animals cannot be subjects of justice within a contract theory framework. But their arguments follow the same general strands of reasoning that are present in Rawls, Carruthers, and Scanlon, so that looking at these three authors' arguments is sufficient to give a good lay of the land.

Next I examine the works of a handful of social contract theorists who have argued that animals are direct subjects of justice: Andrew J. Cohen's secondary moral standing account, Mark Rowlands' neo-Rawlsian account, and Kimberly K. Smith's social judgment/law account. These theorists hold that (1) the ability to reason and to consciously understand terms of agreement are not necessary conditions for being a subject of justice, and (2) animals have a good of their own and blocking this good is wrong because it wrongs *them*. Each theorist argues in her own way that it is possible to reconcile these convictions with the idea of a social contract. It is important to examine their accounts in order to understand the ways in which they fail to include animals as

direct subjects of justice. I will examine these failures in detail in the next chapter. In the second half of this chapter, I outline their accounts.

A. John Rawls' Justice as Fairness

In the years following the publication of *A Theory of Justice*, John Rawls' work, particularly his constructivist methodology for approaching questions of justice, has had a significant impact on those writing in the areas of distributive justice and contract theory. Political constructivism – the view that conceptions of justice are authoritative if they can be derived from public reason and ideas of society and person – is now a dominant paradigm in political philosophy. Any work that draws broad conclusions about distributive justice or contract theory must therefore address Rawls' work. Because of his wide influence, it is helpful to start with his account.

Rawls holds that the purpose of the state is to maintain a fair system of cooperation for its citizens. This purpose is secured when the basic structure of society is ordered according to fair principles. Fair principles are the outcome of a fair procedure for reasoning about how society ought to be ordered.⁸² Representatives of citizens reason about which principles ought to be applied to the basic structure of society. The end of their reasoning is a contract agreement on particular principle(s) that are fair because they are the result of a fair reasoning procedure. Fairness is modeled into the reasoning

82. John Rawls, *Justice as Fairness: A Restatement*, Ed. Erin Kelly, Cambridge: The Belknap Press of Harvard University Press, 2003, Part 1, Section 2 – 4.

procedure by seeing representatives as ignorant of morally irrelevant features about themselves and about each other.⁸³

Rawls describes this contract procedure in the language of metaphor: Contractors step behind a veil of ignorance into the original position and then reason about principles of justice. The original position is a heuristic device that serves to elucidate what justice as fairness looks like and how it can be rooted in public reasoning. It does not justify the principles of justice. The veil excludes knowledge about our own conceptions of the good, our sex or ethnicity, our social ties and our social and economic status in society, our physical strength or intelligence, our psychological propensities, and our personal abilities. Rawls argues that because contractors do not know any of these things about themselves, yet they know that they do have some conception of the good, sex, ethnicity, and so on, and they desire a fair system of cooperation, they will reach a fair agreement on principles of justice. In sum the original position models equality among persons by imagining contractors as being indistinguishable from one another.

Rawls follows David Hume in his reasoning about the circumstances under which the convention of justice may arise. Rawls maintains that parties to the contract will not choose cooperation over non-cooperation unless it is to their mutual advantage to do so. He also agrees with Hume that rough physical and mental equality and moderate scarcity of resources are necessary for cooperation to be mutually advantageous. It follows that rough physical and mental equality and moderate scarcity of resources are necessary for forming a contract.⁸⁴

83. John Rawls, *A Theory of Justice, Revised Edition*. Cambridge: Harvard University Press, 1999, Chapter 1, Section 4. See also *Restatement*, Part 1, Section 6.

84. Rawls, *Justice as Fairness*, 109 – 110.

Individuals represented in the contracting procedure are roughly equal in that they have what Rawls calls the two moral powers, *rationality* and *reasonableness*, to a sufficient degree so that they can take part in a fair system of cooperation. Rational persons have the capacity to form, revise, and pursue their own conceptions of the good and to live in accordance with their own values and purposes. This capacity includes the exercise of both theoretical and practical reason. Reasonable persons have the capacity for a sense of justice. That is, they have the capacity to desire to enter into a social situation in which they can cooperate with one another and to do so on terms that they can freely accept.⁸⁵ Reasonable persons recognize the burdens of judgment – that there are “limits to what can reasonably be justified to others, and so they endorse some form of liberty of conscience and freedom of thought.”⁸⁶

When persons with the two moral powers reason behind the veil of ignorance, Rawls claims that they will arrive at the following pair of political principles:

- (a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
- (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).⁸⁷

Much has been written about these principles and about Rawls’ account of primary goods – that is, liberties, social and economic goods and the like that society is concerned to distribute fairly among its citizens according to those principles. Nussbaum

85. Rawls, *Justice as Fairness*, Part 1, Section 7.

86. John Rawls, *Political Liberalism (Expanded Edition)*, New York: Columbia University Press, 2005, 61.

87. Rawls, *Justice as Fairness*, 42 – 43.

takes Rawls to task for focusing on these goods as things to be distributed rather than as means to achieve truly human functioning. But Rawls and Nussbaum are in substantial agreement about what the important human liberties and basic social and economic needs are. This is as far as I will go in discussing Rawls' account of human primary goods – of greater concern here is the procedural apparatus of Rawls' theory – the circumstances of justice, the original position, the way he models persons, and how these elements of his political conception stand in the way of seeing animals as subjects of justice.

The political justification for Rawls' theory has two main parts: A general, wide reflective equilibrium and the possibility of an overlapping consensus. Wide reflective equilibrium is reached on a political conception when one has (A) adopted that conception and modified one's judgments to make them consistent with it and (B) has done so after considering "the leading conceptions of political justice found in our philosophical tradition (including views critical of the idea of justice itself (some think Marx' view is an example)), and has weighed the force of the different philosophical and other reasons for them."⁸⁸ Wide reflective equilibrium is general when all citizens have achieved it. Rawls maintains that "coherence among considered convictions at all levels of generality and in wide and general reflective equilibrium is all that is required for the practical aim of reaching reasonable agreement on matters of political justice."⁸⁹

In *A Theory of Justice* Rawls only makes use of the idea of reflective equilibrium to justify his account of justice. But in *Political Liberalism*, responding to concerns that his political conception may not be sufficiently stable if it is justified in this way alone, Rawls refines his view. On this refined view, justice as fairness is concerned exclusively

88. Rawls, *Justice as Fairness*, 31.

89. Rawls, *Justice as Fairness*, 32.

with politically liberal societies that already contain in their shared political culture the fundamental ideas that are modeled into the original position. Not only must citizens affirm a political conception by reasoning toward a reflective equilibrium, but they must also be capable of endorsing it each for their own reasons located in their respective comprehensive doctrines. That is, an overlapping consensus must be possible. And this consensus must be possible *on the entire political conception* – on the way in which the original position is modeled and on the moral personality of the contractors, on the idea of reasoning toward reflective equilibrium and an overlapping consensus, as well as on the principles of justice themselves. This kind of political justification is necessary in order to show proper respect for autonomy and for the political conception to remain stable over time.⁹⁰

Rawls says very little about animals. But it is clear from what he does say that he does not think that animals can be subjects of justice on his version of the social contract. In *Theory* he says “While I have not maintained that the capacity for a sense of justice is necessary in order to be owed duties of justice, it does not seem that we are required to give strict justice anyways to creatures lacking this capacity.”⁹¹ And in *Political Liberalism*, he calls questions of justice for animals “a problem on which justice as fairness may fail.”⁹² Rawls thinks that we have moral duties of humanity and compassion toward animals, but these duties are a part of his own comprehensive view of the good, not a part of justice as fairness.

90. See Peri Roberts’ *Political Constructivism* for an interesting argument that Rawls’ move toward a more limited political constructivism in *Political Liberalism* was a mistake (New York: Routledge, 2007).

91. Rawls, *Theory of Justice*, 448.

92. Rawls, *Political Liberalism*, 21.

B. Peter Carruthers' Contract Theory

Peter Carruthers follows Rawls in offering a Kantian constructivist contract theory. Unlike Rawls, however, Carruthers sees all of morality as exhausted by the idea of a social contract grounded in rational agreement – there are no grounds for ethical judgments besides contractual agreement. He maintains that “most contractualists have thought that moral rules are imposed on us in one way or another by our very rationality.”⁹³ By imposing the rules upon ourselves, we ensure that our rationality and others' rationality is duly consulted and respected. If instead others impose the rules upon us without our consent, our rationality is disrespected, and we are treated unjustly. Carruthers maintains that “insofar as we are rational, [we cannot] select an alternative system of concepts. The imaginary contract is a device to filter out irrational elements of our thought so that our rationality is the capacity that determines the rules of the contract.”⁹⁴

Animals cannot impose rules upon themselves, nor can they reason with others about which rules it would be rational to accept – both of which any individual must do in order for Carruthers' contract account to explain why a given set of moral rules should be thought to be binding upon a group of individuals. Imposing rules upon oneself and reasoning with others about which rules to accept requires, among other things, “long-term planning, and... working out the consequences of implementing alternative sets of social rules.”⁹⁵ But as far as we know, animals do not have these capacities. Only

93. Peter Carruthers, *The Animal Issue: Moral Theory In Practice*, Cambridge: Cambridge University Press, 1992, 36.

94. Carruthers, 36.

95. Carruthers, 142 – 43.

humans possess the capacity for Chomskyan innate grammar/language sufficient for the level of moral agency and subjecthood these capacities entail. Thus our agreement to abide by particular rules of social cooperation cannot be an agreement *with* animals. It can only be *imposed on* them by us (rational humans). Hence, animals cannot be moral subjects.

Moreover, because animals are not sufficiently rational, there is nothing about them that a rational agreement needs to respect. Hence, if we impose on animals the rules that we (rational humans) agree upon, we have done them no injustice. Since Carruthers holds that contract theory exhausts the moral sphere, this conclusion is more radical than Rawls' or Scanlon's. Carruthers' account not only cuts animals off from consideration as subjects of justice, but also from any direct moral consideration whatsoever.

As a constructivist, Carruthers seeks consistency between theory and considered beliefs – what he calls common-sense beliefs. He is well aware that the preceding conclusion goes against one widespread common-sense belief in Western society – namely, that most people think that animals are moral subjects. But, Carruthers points out, most people in Western society also think that animal lives cannot be weighed against human lives. Contract theory, he maintains, can plausibly explain both of these common-sense beliefs. Carruthers has already explained the second common-sense belief. It is rooted in the recognition that animals are not direct moral subjects and that human beings are. Morally speaking, humans are in a category of their own. In order to explain the belief that animals are moral subjects in a way that does not end in a contradiction between this and the idea that they are not direct moral subjects, Carruthers takes a different tact.

Carruthers rejects the idea that harming animals is wrong only when doing so harms another human being. To use his example, it is clear that there is a morally relevant difference between throwing darts at a priceless painting and at a cat: It is morally worse to throw darts at the cat. Moreover, it is morally worse whether or not another person is hurt by hurting the animal. Thus the wrong cannot consist in harming human preferences or property. Locke and Kant thought that it was wrong to be cruel to animals because this leads to our being hard in our dealings with people. Locke points out that butchers were not allowed to serve on juries for that very reason [in fifteenth century Britain].⁹⁶ But Carruthers argues that being cruel to animals does not always lead to cruelty in human beings. Butchers are very kind in their relationships with other humans. It is usually the other way around – if one is hard in one’s dealings with people, one will also be so in one’s dealings with animals.

In place of these accounts of why it is wrong to be cruel toward animals, Carruthers proposes his own Kantian-influenced ‘character-expressive account.’ It is not wrong to harm animals because this harms them. Nor is it wrong to be cruel to animals because this leads to cruelty toward humans, as Kant thought (and as some authors have mistakenly thought Carruthers argues).⁹⁷ What we are picking up on when we see the wrongness of being cruel to animals, according to Carruthers, is the blameworthiness of the disposition to be cruel to human beings. Cruelty to animals expresses a faulty

96. See John Locke, “Of Cruelty” In *Some Thoughts Concerning Education and of the Conduct of the Understanding*, Ed. by Ruth w. Grant and Nathan Tarcov, Indianapolis: Hackett Publishing Company, Inc., 1996, §110).

97. In his entry for the *Internet Encyclopedia of Philosophy*, for instance, Scott D. Wilson wrongly lumps Carruthers’ account in with the Kantian family of accounts that sees the wrongness of harming animals as derivative from the wrong this does to human beings (See the entry on Animals and Ethics”, Section 1.e).

character that is judged faulty because of the wrongness of being cruel toward human beings. Likewise, kindness toward animals is judged praiseworthy because it is praiseworthy to show kindness toward human beings. The common-sense belief that animals are moral subjects is hence not really a belief about animals at all. It is a belief about the character of human beings, normatively grounded in judgments about the right kinds of dispositions human beings ought to have in relation to one another. Carruthers explains it this way:

We may sympathize with animals' suffering – i.e., we may have a settled moral disposition to do so, but reflection reveals that this disposition does not justify or indicate the moral status of animals, but that of humans. Contracting rational agents should agree to try to develop a ready sympathy for one another's suffering, and sympathy for animal suffering is, on the current proposal, merely a side-effect of this general attitude.⁹⁸

Carruthers anticipates a familiar objection. If one's only reason for excluding animals from moral consideration is that they lack the requisite rational capacity, then humans who lack this capacity ought also be excluded. This includes infants, small children, cognitively impaired individuals, and many elderly. But it is false that these human individuals ought to be excluded. Therefore, animals should not be excluded from moral consideration because they lack the requisite rational capacity. In response, Carruthers argues that though non-rational persons are not moral subjects *per se*, we have two good pragmatic reasons for treating them as if they were, whereas we have no similarly good pragmatic reasons for treating animals as if they were.⁹⁹

Carruthers' first argument that we ought to treat non-rational humans as if they were subjects of justice is a slippery slope. He observes that there are no sharp boundaries

98. Carruthers, 154.

99. Carruthers, 110 – 111.

between fully rational and non-rational human beings: “There are no sharp boundaries between a baby and an adult, between a not-very-intelligent adult and a severe mental defective, or between a normal old person and someone who is severely senile. The attempt to accord direct moral rights only to rational agents (normal adults) would [therefore] be inherently dangerous and open to abuse.”¹⁰⁰ By abuse, Carruthers means that it would be easy to wrongly judge sufficiently rational subjects of justice ‘not rational enough.’ And if they are so judged, they are likely to be treated unjustly. There is a danger of pushing the rationality line too far up. In contrast, there are sharp boundaries between humans and animals. No animal is sufficiently rational to be a subject of justice, so the danger of pushing the line too far up is really no danger at all. Carruthers concludes that we ought to treat non-rational humans as full subjects of justice, but there is no need treat non-rational animals in this way.

Second, Carruthers argues that social stability would be threatened if non-rational humans were not seen as direct moral subjects. “Human beings are apt to care as intensely for their offspring as they care about anything, irrespective of age and intelligence,...[Thus] a rule withholding moral standing from those who are very young, very old, or mentally defective is thus likely to produce social instability in that many people would find themselves psychologically incapable of living in compliance with it.”¹⁰¹ Carruthers concludes that social rules must be fully applied to non-rational as well as to rational humans. He insists on the other hand that no such serious threat is posed to social stability should animals not be treated as direct moral subjects. So while we ought

100. Carruthers, 114.

101. Carruthers, 117.

to treat non-rational humans as full subjects of justice, we need not treat non-rational animals in this way.

C. T. M. Scanlon's Contract Theory

T. M. Scanlon develops his contract theory as a framework within which to understand the question of what we owe each other, in any context. He holds that this question makes sense in both political and moral contexts. Thus, his account is a moral one, though not exhaustive of the moral sphere, and not explicitly political. Scanlon's theory has two key components. First, according to Scanlon, "contractualism holds that an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced general agreement."¹⁰² Second, contractors are motivated by the desire to "live with others on terms that they could not reasonably reject."¹⁰³ Scanlon explains: "The feeling of estrangement [of guilt] of having violated the requirements of a valuable relationship with others...corresponds to a positive 'pull': the positive value of living with others on terms that they could not reasonably reject... I believe that this is a powerful source of motivation."¹⁰⁴ Those who are not motivated in this way are not a party to the contract and, by Scanlon's lights, are 'amoral.' This is emphatically not a mere agreement for mutual advantage.

102. Scanlon, T. M. *What We Owe Each Other*, Cambridge: The Belknap Press of Harvard University Press,, 1998, 153.

103. Scanlon, 154.

104. Scanlon, 162 – 63.

On Scanlon's account, the contractors are not understood as abstract entities as they are on Rawls' account. They are rather real individuals possessing, as Carruthers puts it, "full knowledge of their own idiosyncratic desires and qualities, and their position within the current nature of society."¹⁰⁵ Nevertheless, the judgment that *x* is reasonable is not "a judgment about what would most be likely to advance their interests or to produce agreement in their actual circumstances or in any more idealized situation, but rather a judgment about the suitability of certain principles to serve as the basis for a mutual recognition and accommodation."¹⁰⁶ "Only those objections that a person could raise while recognizing the force of similar objections by others"¹⁰⁷ are taken into account. Reasonable principles that result from considering each others' reasons and objections to those reasons will limit coercion and harm of others.

Scanlon maintains that though an individual may have a good of her own, this does not guarantee that the individual is owed justification for the principles we choose. Non-sentient beings, for instance, have a good of their own. But Scanlon maintains that intuitively, because they are not conscious [and thus cannot justify principles to other contractors], they are not subjects of the contract. This excludes all non-sentient living organisms from consideration as subjects of justice. Scanlon thinks that we would on the other hand want our actions to be justifiable to conscious beings capable of making moral judgments of the right kind, whether or not it is to our advantage to cooperate with them. He next turns to the question of whether sentient animals can be subjects of justice.

105. Carruthers, 103.

106. Scanlon, 194.

107. Scanlon, 171.

Scanlon thinks it makes sense to justify one's moral judgments to beings that are "capable of judgment-sensitive attitudes but not moral reasoning,"¹⁰⁸ even if this needs to be done counterfactually. But he also thinks this capability is somehow linked to the capacity for language, so that one cannot have the former without the latter. So among sentient animals, in order to be owed something as a moral subject, an individual must (A) be able to form judgment sensitive attitudes and (B) have the capacity for language. There aren't any animals that have a capacity for language in the sense that is necessary in order to form judgment sensitive attitudes. Animals are therefore not members of the class of beings to whom we owe something. This is a variation of the same general argument Carruthers makes that animals are excluded as moral subjects because they lack the rational capacity to take part in forming a contract. It is also implicit in Rawls' claim that animals are not subjects of justice on his social contract theory.

Finally Scanlon thinks that contract theory might be extended to include all beings that have a good of their own "if it holds that in deciding which principles could not reasonably be rejected we must take into account objections that could be raised by trustees representing creatures in this group who themselves lack the capacity to assess reasons."¹⁰⁹ The extension might be plausibly made, he thinks, to limit principles chosen so as to protect animals from pain and distress, and not to limit interference with animals' goods in other respects. But Scanlon asserts that it makes no sense to take into account objections raised by trustees who represent creatures that cannot assess reasons. Hence,

108. Scanlon, 180.

109. Scanlon, 183.

he rejects the idea that contract theory can be extended to include all beings that have a good of their own.

In contrast to his sharp dismissal of the trusteeship option for including animals as subjects of justice, Scanlon embraces the option for including mentally impaired humans in the contract agreement. He argues that because non-rational humans are born to us, but animals are not, we ought to treat the former ‘as human’, but need not be concerned with the latter. In his words, “The beings in question here are ones who are born to us or to others to whom we are bound by the requirements of justifiability. This tie of birth gives us good reason to want to treat them ‘as human’ despite their limited capacities.”¹¹⁰

D. Andrew I. Cohen’s Contractarianism

Andrew I. Cohen argues that animals have direct moral status on a plausible contract theory and that principles following from such a theory can provide them with significant protection. He holds that much confusion has arisen about how animals may be viewed within a contract theoretical framework because not enough time has been spent clarifying what direct moral status is and how it relates to primary and secondary moral standing. So he begins his argument by clarifying his terms. Cohen defines *direct moral status* as “the status an animal enjoys when moral considerations are owed to the animal in question”¹¹¹ and distinguishes between two kinds of direct moral status: primary and secondary moral standing: “An animal can have *primary moral standing* if it can be said to participate in the original agreement through which moral status is

110. Scanlon, 185.

111. Andrew I. Cohen, “Contractarianism and Interspecies Welfare Conflicts,” In *Social Philosophy & Policy*, Vol. 26, No. 1, 2009, 235.

generated.”¹¹² Animals cannot have primary moral standing because they cannot reach agreement on how to limit each other’s actions, that is, they cannot participate in the framing of a contract.

Animals can however have secondary moral standing. According to Cohen, “an entity has secondary moral standing with respect to some person(s) when a contractor insists on such standing and another party agrees to extend it.”¹¹³ It is clearly possible for animals to have this kind of value. A contractor, for instance, might agree to cooperate with others only if they extend to some animal or animals direct moral status. Cohen maintains that “an entity with secondary moral standing is directly owed moral consideration even though its moral status is the result of third-party demand.”¹¹⁴ That is, the basis for the moral treatment of animals is not what the contractors owe to each other. It is what the contractors owe to animals on the basis of their agreement with one another, *if* they reach an agreement with other contractors to extend direct moral status to animals.

Cohen acknowledges that some contract theories exclude animals from direct moral consideration because they conceive of contractors as strictly self-interested. But he denies that all plausible contract theories must exclude animals, or exclude them for this reason. It is a fact that many people [who are themselves capable of framing a contract] have benevolent motives toward animals and view them as direct moral subjects. This is enough to show that contractors may have benevolent motives toward animals and see them as moral subjects whose good must be taken into account.

112. Cohen, 235.

113. Cohen, 236.

114. Cohen, 236.

Cohen further argues that secondary moral status can be just as demanding as far as protections for the animals as primary moral standing. If the contractors see it as important that animals are protected not only from cruelty and death at the hands of others, but also that they are given adequate space to move around, opportunities to play, and so on, then they may choose principles that guarantee them the opportunities for these things. A related worry is that only the animals the contractors are fond of will receive protection, or that these favored animals will receive greater protection than other animals. Perhaps so. But Cohen draws attention back to his thesis, which he maintains is unaffected by this worry. All he is trying to show is that animals – by which he seems to mean at least some animal – can be included as subjects of justice on a plausible contract theory. He is not arguing that all animals will be included, or that animals can be included on an equal basis with each other.

Each of these outcomes may or may not obtain, depending on the preferences of the contractors in question. In cases of conflict between the welfare of animals and humans, because human beings have primary moral status, they will receive direct moral consideration in the contract. Their consideration is never dependent upon their preferences for or against each other. In contrast, the outcome of conflict between the welfare of animals and humans, the outcome for the animals involved will depend upon the preferences of the contractors. Cohen is quick to emphasize that this does not mean that all resolutions to conflicts are to be decided solely by human preferences. The contractors may “endorse moral norms that forbid unnecessary welfare setbacks to morally considerable entities,” and act on that basis.¹¹⁵

115. Cohen, 251.

E. Mark Rowlands' Neo-Rawlsian Social Contract

In his book *Animal Rights: A Philosophical Defence*,¹¹⁶ Mark Rowlands boldly proclaims: “The very content of the concept of equal consideration embodied in the liberal political tradition logically requires that the principle of equal consideration be extended beyond the human sphere.”¹¹⁷ Hence, insofar as a contract theory is a part of the liberal political tradition, not only can it include animals as subjects of justice, it *must* include them. He argues for this claim largely from within the framework of Rawlsian constructivism. He dubs his own version *neo-Rawlsianism*.

Rowlands begins his argument that animals are subjects of justice by positing the *principle of universalizability*, which states that “there can be no moral difference without a relevant natural difference.”¹¹⁸ From the principle of universalizability he derives the *principle of equal consideration*, which holds that “all relevantly similar individuals should be accorded equal consideration and respect.” Just what equal consideration and respect amounts to depends upon the moral theory to which one adheres. For the Hobbesian, “equal with respect to power over one another”; for the Lockean, “equal with respect to one’s value before God”; and so on.

Rowlands continues, “If different moral theories and political ideologies embody distinct conceptions of what it means to treat individuals with equal consideration [and these different theories and ideologies are common in a society], then it would make

116. Mark Rowlands. *Animal Rights: A Philosophical Defence*. New York: St. Martin’s Press, Inc., 1998.

117. Rowlands, 7.

118. Rowlands, 6.

sense to work from a currently dominant political ideology.”¹¹⁹ Rowlands observes that liberalism is the dominant political ideology in the West and that the principle of equal consideration is at the very heart of liberalism. Hence, it is the right principle to work from in constructing a contract in Western societies.

Next Rowlands introduces what he calls the *intuitive equality argument*. The argument holds that individuals are not morally entitled to benefits they obtain through properties that they are not responsible for having, and this is so *because* they are not responsible for having the properties. Rowlands maintains that Rawls applies the intuitive equality argument to decide which reflective intuitions ought to be used to model the original position. Therefore, in the final estimation, Rawls’ principles of justice are derived from the intuitive equality argument. Yet Rowlands argues that Rawls arrives at the wrong conclusion about whether nonrational individuals and animals are subjects of justice because he does not apply this argument consistently.

Following the reasoning of the intuitive equality argument, Rowlands argues that since rational capacity is not something an individual can earn, one is not morally entitled to the benefits that come from being rational. Therefore, “to restrict the beneficiaries of the protection offered by the contract to rational agents would be to contravene the intuitive equality argument.”¹²⁰ The same holds true for species membership: We can do nothing to earn our human being nor the benefits that come from being human. Hence, to restrict the beneficiaries of the protection offered by the contract to human beings would be to contravene the intuitive equality argument. Finally, Rowlands modifies Rawls’

119. Rowlands, 6. Bracketed words added.

120. Rowlands, 140.

original position to reflect a consistent application of the argument. He adds rationality and species membership to the list of properties that are veiled from view in the original position.

Rowlands supplies this caveat: It must be possible for contractors in the original position to “rationally worry about being”¹²¹ the creatures for whom they are devising principles of justice. But one cannot rationally worry about being a nonsentient creature – a bacteria or a tree, for instance – because there is nothing that it is like to be such a creature. Therefore, only sentient animals are subjects of justice. This feature is easily modeled by our inability to worry about being an entity that has no conscious existence.

What kind of political principles might one choose in Rowlands’ modified original position? He convincingly argues that so far as it is connected with the practice of raising animals for human consumption, animal husbandry would be ruled out by whatever principles are chosen. This follows from the thought that one would rather forgo the pleasure of eating meat and the nutrition it provides than be raised, killed, and eaten by other creatures.¹²² The principles chosen would shape a society of vegetarians. Rowlands also addresses the common counterargument to abolishing animal husbandry – that this abolition would impose undue economic hardship on those whose livelihood is tied up with the practice. He insists that such economic considerations are not relevant in

121. Rowlands, 159.

122. Rowlands also makes the more controversial argument that the human practice of raising animals to consume them is an injustice that is analogous to human slavery. I will not go into detail on his arguments here. I will only say that there are multiple disanalogies between the two cases and the issue is more complex than Rowlands makes it out to be. I will explore some of these complexities in the next chapter.

the original position: “the direction of economic resources and the resulting character of economic relations are themselves open to negotiation in the original position.”¹²³

Rowlands thinks it might appear that contractors in the original position would affirm a duty to assist prey animals out of fear that they may be prey. But he is confident that this fear is balanced out by other considerations – that we may end up predators instead of prey, and therefore, would need to kill to survive, and that if predators aren’t allowed to kill prey, prey will end up starving due to overpopulation. Hence, Rowlands concludes that we ought to “Let them be!”¹²⁴ At one point he observes that this insight applies to the Inuit as well. They may be classed as carnivores since their survival depends upon eating meat. They would therefore not be stopped from doing so by the principles selected behind the veil.

F. Kimberly K. Smith on Animals and the Social Contract

Kimberly K. Smith argues that contract theory can include animals as subjects of justice if we stay focused on the purpose of contract theory. The point of a social contract is not to secure protection from domination, but to state the conditions under which the use of force is legitimate from the point of view of the individual against whom force is being used (i.e., potentially everyone under the power of the state). “All that is required [for this] is that the dominant party has the moral sensibility to need to justify his or her actions to the unequal party in some way.”¹²⁵ Animals can therefore be included in the

123. Rowlands, 157.

124. Rowlands, 153.

125. Smith, Kimberly K. “Animals and the Social Contract” In *Environmental Ethics*, Vol. 30, No. 2 (Summer 2008): 195 – 207, 200. Bracketed words added.

contracting, even without appealing to metaphysical doctrines, as long as we see animals as having interests that can be thwarted, and as long as we see these interests as potential restraints on our treatment of them. Agreeing with Nussbaum once more, Smith observes that we do often see animals in this way. Therefore, “those animals *that the human parties to the social contract recognize as equally free* (for the limited political purpose of designing a just regime) may properly be included in the social contract.”¹²⁶

Smith also endorses Rawls’ reasoning toward reflective equilibrium. The idea that at least some animals are members of a social contract, Smith maintains, “is consistent with and makes sense of most of our laws, ways of talking about animals in public discourse, and well-documented measures of public opinion.”¹²⁷ Moreover, if we understand the conditions for being a subject of justice as Smith does, she insists, “Our principles will cohere better with our considered judgments, not only with respect to animals, but also with respect to humans who are incapable of achieving rational autonomy.”¹²⁸

Smith rejects, however, the idea of an abstract initial choice situation as well as all other attempts to model moral equality or to ground justice in philosophical principles. She suggests that we ought to instead be concerned with the way things really are on the ground, in the particular societies with which we are concerned. We therefore judge whether particular animals are members of a political community and therefore subjects of justice in that community rather than whether they are members in some kind of

126. Smith, “Social Contract...”, 203.

127. Kimberly K. Smith, *Governing Animals: Animal Welfare and the Liberal State*. New York: Oxford University Press, 2012. 43.

128. Smith, *Governing Animals*, 51.

abstract sense. Smith proposes two criteria for judging whether animals are a part of a particular community. Animals are members of our particular political community if (1) we recognize them as being free subjects of justice and (2) our state has laws regulating individuals of their kind. Smith concludes with a positive proposal that is clearly influenced by Midgley's idea of the mixed human-animal community: "Animals become members of the social and political community when they become entangled in certain kinds of relationships – relationships of care and dependence, or family relationships – with community members who come to realize that these animals have a good of their own..."¹²⁹

Smith is thinking of pets as the paradigmatic members of this community: Their interests are not at odds with our own and we are clearly in community with these animals, forming relationships of care and dependence with them. Moreover, we recognize them as having a good of their own. Also among the members of our political community are wild animals with whom we have similarly meaningful relationships, such as those living in zoos, and commensal animals like migratory birds.

Smith argues that pests are good examples of individuals with whom we are not in political community. "Their interests cannot, by definition, be harmonized with ours, and therefore they are not properly speaking engaged in a scheme of social cooperation with us (Of course, as individuals, we might still have moral duties toward them: not to cause them undue suffering, for example)."¹³⁰ Nor are wild animals with whom we do not have such relations in political community with us. Stray and feral animals are neither clearly

129. Smith, "Social Contract...", 206 – 07.

130. Smith, *Governing Animals*, 63.

in nor out of the contract, according to Smith. When to consider them members and when not to consider them as such must be determined on a case-by-case basis, using contextual justification.

Smith argues that livestock are certainly members of the social contract with us because “they live with us in close relations of interdependence and mutuality, and...livestock have historically received the highest level of government protection.”¹³¹ Smith notes that our treatment of livestock often does not reflect their status as members of our community. We often treat them horribly while they are alive. Smith argues that the practice of industrial farming and the commodification of animals that it involves must be changed. Yet she also maintains that the kind of autonomy and flourishing livestock are owed as members of the political community actually depends upon “well-developed social practices of animal husbandry” – what ‘good farmers’ who are attentive to their animals’ needs engage in.¹³² Livestock cannot flourish without being cared for in this way. She goes further – she claims that livestock cannot even exist unless animal husbandry continues: “If we “freed” livestock, most of them would simply die off. And if we didn’t eat them, we would have no reason to raise cattle, hogs, poultry, and other livestock. Some feral populations might survive emancipation, but most domestic species would disappear altogether.”¹³³

Smith also argues that killing animals for food is not a violation of our political relationship with them. As long as they have been treated well while living, nothing

131. Smith, *Governing Animals*, 63.

132. Smith, *Governing Animals*, 64.

133. Smith, *Governing Animals*, 64.

politically wrong is done to them by killing them. Smith seems to see death in exchange for care as the very essence of the domesticated animal contract.¹³⁴ She does not give an argument for this, but asks whether Elmer Lapp-type Wendell Berry farmers (i.e., ‘salt of the earth folk’)¹³⁵ or radical animal rights advocates are more admirable. She states that she is inclined to say the former kind of person is more admirable. She explains:

People who raise livestock in this intimate, responsible, and humane manner commit themselves to a difficult and demanding job, and they make very little money from it...They choose this work *and* this diet because they like to raise animals...Instead of preserving an ancient social practice [i.e., animal husbandry] that brings us into a deeply meaningful and demanding relationship with animals, these [animal rights] advocates want to get rid of that relationship *and the animals that are a part of it.*”¹³⁶

To be clear, Smith does not think that the opposing moral intuition that vegetarianism would be the better option to meat-eating and animal husbandry is unreasonable. But she does not think the intuition is compatible with seeing livestock as members of a social contract, since she thinks the kinds of policy it recommends are too radical to garner widespread support.

Finally, Smith argues that it is ‘debatable’ whether animals used in research are members of the contract by the same logic by she uses to argue that livestock are members of the contract. But she claims that they are members, although they do not share the kind of historical story about a mutually dependent relationship with us that

134. Stephen Budiansky examines the idea of a domesticated animal contract in his book *The Covenant of the Wild: Why Animals Chose Domestication* (Yale University Press: New Haven, 1992). Budiansky argues that the relationship between humans and domestic animals is an instance of mutually beneficial coevolution. I do not think what Budiansky describes, or what Smith describes as the domestic animal contract are social contracts, so I do not examine these accounts in any detail here. I will, however, do so in Chapter 5.

135. See Wendell Berry, *The Gift of Good Land*. San Francisco: North Point Press, 1981.

136. Smith, *Governing Animals*, 65. Bracketed words mine.

livestock do, nor are they currently treated as members. Smith does not advocate abolition of animal experimentation any more than she does animal husbandry. She maintains that “Instead of relying on flat prohibitions, the system requires the scientific community to develop ethical guidelines, to educate and police itself, and to open its practices to public scrutiny.”¹³⁷ She cautions that in reforming the system in this case, adequate hearing must be given to all the parties involved, so that the principles of public justification may be duly respected. In other words, if many people still think animal experimentation is justified, then we ought not to push for it to end. We ought to instead push for less sweeping policy change.

G. Conclusion

In this chapter I have examined arguments from a variety of social contract theorists. Some like Carruthers have not seen animals as moral subjects let alone subjects of justice. Others like Rowlands and Smith have viewed animals as direct subjects of justice in the very same way that human beings are.

In the next chapter I will bring social contract theory side by side with Nussbaum’s capabilities approach. I will first I will highlight Nussbaum’s arguments against social contract theory. I will then argue that Nussbaum’s criticisms of Rawls’ account also hold against Scanlon’s and Carruthers’, and that Cohen’s argument that animals can be direct subjects of justice on a plausible contract theory fails. I will also argue that Rowlands’ account fails because it is overly egalitarian and that Smith’s fails because it does not include a substantive conception of the good.

137. Smith, *Governing Animals*, 158.

CHAPTER 4

PROBLEMS WITH SOCIAL CONTRACT THEORY

ABSTRACT

In my project I argue that my version of the capabilities approach provides a better framework for including animals as subjects of justice in Western liberal societies than Martha Nussbaum's version of the approach, Tom Regan's animal rights, Peter Singer's animal welfare, or any social contract theory. I first lay out Nussbaum's capabilities approach. Then I examine several versions of the social contract, highlighting a number of reasons that animals cannot be included as subjects of justice on a social contract theory. After this I consider Regan's animal rights and Singer's animal welfare accounts, as well as Val Plumwood's egalitarian account of the intentional other, Mary Midgley's affective account, and Clare Palmer's causal history account of our responsibilities toward animals. Drawing on Plumwood's and Palmer's work, in the last section, I craft a version of the capabilities approach that departs significantly from Nussbaum's version in two ways. First, on my approach, individuals are valuable by virtue of their form of life, rather than by virtue of the capacities they actually have. Second, following Palmer, I hold that our responsibilities toward them are partly determined by the ways in which we have made them vulnerable to harm, rather than only by the overriding moral directive to provide every individual the opportunity to flourish. I argue that these components of my account enable it to avoid critical problems that Nussbaum's account, Regan's animal rights, Singer's animal welfare, and social contract theories cannot.

In this chapter I argue that social contract theory cannot include animals as subjects of justice. Nussbaum has already argued extensively for this point from within a capabilities framework, so I begin the first half of the chapter by outlining Nussbaum's two main arguments that social contract theory cannot include them: the argument from the circumstances of justice and the argument from the conception of a person. I then argue that taken together, these arguments give us sufficient reason to think that animals cannot be included as subjects of justice on Rawls', Carruthers', and Scanlon's accounts, and that this same negative conclusion holds for all sufficiently similar accounts.

Nussbaum's arguments fail, however, to show that Cohen, Rowlands, and Smiths' versions of the social contract cannot include animals as subjects of justice. But while their version of the social contract do not exclude animals in the way that Rawls', Carruthers', or Scanlon's does, I argue that Cohen's, Rowlands', and Smith's attempts to include animals as subjects of justice also fail, each for its own reasons. Cohen's account does not show that animals can be direct subjects of justice on a social contract, only that they can be protected as indirect subjects. Rowlands' account is overly egalitarian. And Smith's account fails because it does not include a substantive conception of the political good.

A. Nussbaum's Argument from the Circumstances of Justice

I begin with Nussbaum's argument from the circumstances of justice. Hume thought that justice was a matter of convention.¹³⁸ Nevertheless, Nussbaum maintains that the circumstances under which Hume argues the convention of justice arises are the

138. David Hume, *An Enquiry Concerning the Principles of Morals*. Indianapolis: Hackett Publishing Company, Inc., 1983 – See §3.

very same circumstances that classical contract theorists argue are necessary for reaching agreement on principles of justice. Rawls sees Hume as having accurately articulated the conditions under which individuals would agree to cooperate to form a civil society.¹³⁹ Individuals only cooperate if doing so is to their mutual advantage, and it is only to their mutual advantage if they are roughly equal in physical and mental ability and if there is a moderate scarcity of resources. The requirement of moderate scarcity of resources may raise pragmatic concerns for seeing animals as subjects of justice. But the more general idea that individuals only cooperate if it is to their mutual advantage and that this requires some kind of physical and mental equality poses a more significant philosophical problem.

The idea that there must be rough physical and mental equality among subjects of justice excludes animals because they are not roughly equal in physical ability to physically ‘normal’ human beings, and they are not roughly equal in mental ability to mentally ‘normal’ human beings. ‘Normal’ human physical capacities are not remarkable – many animals possess greater strength, speed, agility and the like than humans possess. In most cases however, ‘normal’ human mental capacities – capacities like abstract thinking and creative problem solving – are great enough that their unremarkable physical capacities do little to undermine their domination of animals. Humans’ comparatively greater mental capacities make animals easy to dominate. As Nussbaum

139. Nussbaum notes in *Frontiers* that Rawls’ account is in one key respect more amenable to Hume’s conventionalism than classical contract theories are: “Rawls is able to combine Hume with the social contract tradition because his own account of justice has no role for natural rights and is in that sense close to Hume’s conventionalism” (46).

describes it, “the asymmetry of power between humans and nonhuman animals is too great to imagine any contract we might make with them as a real contract.”¹⁴⁰

Neither Nussbaum nor Hume give any examples to illustrate the asymmetry of power involved in the human-animal relationship, but it is not difficult to do so. We (humans) do whatever is expedient for producing milk in dairy cattle and meat from pigs, paying little attention to what is required in order for them to flourish. These animals are not able to resist harmful treatment except in the most fleeting and inconsequential of ways. An animal might but its captor or attempt to flee if given the chance. But in the end, any resistance can be overcome. We prod the cattle back into their pens. We control them with drugs to make them easier to handle or to produce more milk or meat. We can easily kill them if they become dangerous to us or to other animals in ways that jeopardize profits. In contrast, we are more often caring and careful not to harm in our relationships with companion animals like dogs and cats. But their faring better (relatively speaking) in our hands is entirely our choice and not theirs. They are as much at the mercy of our decisions and predilections as agricultural animals are.

If humans will only *co-operate* with each other or with animals if it is to their advantage, and if animals are as easily dominated by humans as Hume suggests and as I have illustrated, then it is impossible for us to *co-operate* with them. We can only impose our purposes upon them or allow or help them to pursue theirs, as far as we are willing. Under such conditions, they have no choice in the matter as to whether the relationship will benefit them.

140. Nussbaum, *Frontiers*, 334.

Let us return to Rawls for a moment to see how his commitment to Humean circumstances of justice prevents contractors from including animals as subjects of justice on his account. Rawls maintains that individuals in a well-ordered society, i.e., those to whom the principles of justice apply, accept commitments to one another that may be greater than those they would in other societies. But they only do this with the understanding that other members are fully cooperating over a complete life. Fully cooperating members are economically productive ones – ones that have a roughly equal capacity for reciprocity. But animals are not economically productive in this sense.¹⁴¹ Thus, they cannot be members of a well-ordered society and cannot be subjects of justice on Rawls' account.

The way in which Carruthers' assumption of Humean circumstances of justice prevents him from including animals as subjects of justice is likewise straightforward. Carruthers holds that individuals must be cognitively similar enough that they can agree on what rules are rational to accept – any who do not reach the threshold level of cognitive equality are too easily dominated for us to agree *with* them. We could only ever agree among ourselves to apply to them the rules we rationally accept. Therefore, animals cannot be subjects of justice on Carruthers' account.

Hobbes excludes animals from his social contract because he thinks they lack the ability to understand the terms of a covenant. Hobbes puts it this way: "To make Covenant with bruit Beasts, is impossible; because not understanding our speech, they understand not, nor accept of any translation of Right; nor can translate any Right to

141. Nor, as Nussbaum points out, are human beings economically productive over the entire course of their lifetimes. They always start out and often end up very dependent on others to meet their most basic needs.

another: and without mutual acception, there is no Covenant.”¹⁴² This reason for excluding animals follows from Nussbaum’s argument from the conception of a person (see section B). But it is also clear that animals that lack not only the ability to communicate but also the ability to understand the terms of the contract are not roughly equal to humans in mental ability.¹⁴³

Locke gives his most succinct statement on the matter in point 5 of chapter 2 of his *Treatise*: “Being furnished with like faculties, sharing all in one community of Nature, there cannot be supposed any subordination among us that may authorise us to destroy one another, as if we were made for one another’s uses, as the inferior ranks of creatures are for ours.”¹⁴⁴ Locke ties faculties very closely to morality here. For Locke, physical and mental equality places individuals into a community with one another that is characterized by moral equality. Beings that lack this physical and mental equality are outside of this community, and thus not moral equals and not subject to any agreement reached by members of the community. These beings include animals and, historical evidence suggests, some races of human beings.¹⁴⁵

Scanlon rejects the Humean assumptions about what is necessary in order for contractors to reach an agreement. He thinks that we would want conscious beings to understand why we judge as we do in moral matters even if it were not to our advantage

142. Thomas Hobbes, *Leviathan*. New York: Penguin Putnam Inc., 1985, Chapter XIV, Part I, 197.

143. Some authors have argued that Nussbaum overstates the case against classical contract theory that can be made by drawing our attention to the Humean circumstances of justice. See for instance Kimberly K. Smith’s article (cited earlier).

144. Locke, John. *The Second Treatise on Civil Government*. Buffalo, NY: Prometheus Books, 1986, Chapter II, §6.

145. Consider Locke’s infamous investment in the Royal African Company and his help in drafting the Fundamental Constitutions in 1669, a document that granted slaveholders in Carolina absolute power and authority over their negro slaves.

to cooperate with them. He also denies that an equal capacity to make moral judgments is required, since it makes sense to say that we owe something to individuals who are capable of judgment-sensitive attitudes, even if they cannot reason morally. But his account fails in another way, which I will now consider.

B. Nussbaum's Argument from the Conception of a Person.

Nussbaum's second main argument against the possibility of including animals as subjects of justice on a social contract theory is her argument from the conception of a person. This argument is closely related to the argument from the circumstances of justice in that one's conception of a person includes the person's rough physical and mental equality. Nussbaum does not apply this argument to the classical contract tradition (though I have suggested it applies to Hobbes). Instead she develops it primarily against Rawls' justice as fairness, and secondarily against other contract theories that include Kantian moral agency as a condition for being a subject of justice, to show that they are inadequate for considering other animals and therefore, that a capabilities approach is needed.

Rawls holds that only persons who possess the two moral powers to a sufficient degree can take part in a fair system of cooperation. Since only persons who possess the two moral powers (the capacity to form a conception of the good and a sense of justice) to a sufficient degree are represented in the contracting process and only represented persons can be subject to the terms of the contract, and because animals do not have the two moral powers to a sufficient degree, they cannot be direct subjects of Rawlsian justice. Rawls is aware that his Kantian conception of a person excludes animals from

being subjects of justice (see chapter 3, section A), but he does not think that this means there is something wrong with his account of justice.

Because Carruthers sees contract theory as exhaustive of all morality, he does not take the same care that Rawls does to distinguish a ‘political’ conception of a person from a ‘pre-political’ conception. Rather, animals are altogether excluded from direct moral consideration because they are not sufficiently rational to warrant such consideration. Rational agreement is only required for the purpose of respecting rationality. Rational agreement does not need to include animals because they are not sufficiently rational.

Scanlon sees contract theory as covering some moral judgments in the areas of both personal relationships and ‘justice.’ So he, like Carruthers, does not distinguish between political and pre-political conceptions of a person. Yet although Scanlon’s contract theory does not see cooperation purely in terms of mutual advantage, he excludes animals on other grounds. Scanlon argues that the question of what we owe to each other only makes sense if each individual who raises the question also has a highly developed capacity for rational understanding and for language. Only human beings have both, so only human beings can be subjects of justice. On Scanlon’s account, we therefore owe animals nothing.¹⁴⁶

146. Contra Scanlon, Matthew Talbert has argued that animals can have a point of view such that they can have reasons to object to our treatment of them in some cases. Thus animals can be included in a social contract (See “Contractarianism and Our Duties to Nonhuman Animals,” In *Environmental Ethics* 28 (2006): 204). But I shall argue later in this chapter that such a view entails an objectionable interspecies egalitarianism.

C. The Right Circumstances of Justice, the Right Conception of a Person

The arguments that I have outlined above – Nussbaum’s arguments from the circumstances of justice and the concept of a person – show how the most influential social contract theories of the past and of our time exclude animals from consideration as direct subjects of justice. Yet if the circumstances under which justice is possible *really are* Humean and if the Kantian conception of a person *is* the right one, then animals cannot be direct subjects of justice, however strongly one might wish that this were not the case. Fortunately, cooperation does not require Humean circumstances of justice and the Kantian conception of the person is mistaken in very fundamental ways. The central problem with these aspects of social contract theory is that they do not realistically describe the conditions under which human beings cooperate, nor do they accurately describe what human beings are like.

Nussbaum maintains, plausibly, that we cannot determine what justice requires unless the political conception of a person is modeled on the way that persons actually are. She holds that Rawls’ political conception of persons as ‘normal’ and ‘fully cooperating’ Kantian rational agents is an idealized, not-so-useful fiction that needs to be replaced with her own political conception of a person that models the way human beings really are. The same goes for other similarly Kantian conceptions of a person.

Human beings are interested in pursuing justice and freely choosing and ordering their lives in accordance with practical reason. But they are not *only* Kantian rational agents. They are also social, dependent beings with deep needs whose rational functioning cannot be separated from their “animal” functioning. “The dignity of the human being is the dignity of a needy, enmattered being” with both “rationality and

animality thoroughly interwoven.”¹⁴⁷ Human beings can see that animals are needy and enmattered in the same way they are. They can recognize and desire the good of other kinds of beings, just as they recognize and desire the good of their own.

Because humans have benevolent sentiments and can feel compassion for others, they do not need to be roughly equal in physical and mental ability in order to be motivated to cooperate with other beings. Because they often cooperate out of a desire to further the good of others, even when doing so is burdensome or harmful, there does not need to be a moderate scarcity of resources before they cooperate with other beings. Human beings may also see the advantages of cooperation as including many aspects of relationship with other animals that many contract theorists fail to consider or think of as negative costs.¹⁴⁸

In rejecting Humean circumstances of justice and in conceiving of political persons in a concrete rather than an abstract fashion, Nussbaum’s capabilities approach is better able to include animals as subjects of justice than are many contract theories. But it is not only better able to do this. It also sees the inclusion of animals as subjects of justice as a matter of urgent necessity. Because human beings can recognize the different kinds of dignity that animals have, they are morally obligated to protect the opportunity for those beings to flourish alongside their human counterparts. This moral obligation belongs to society as a whole. Nussbaum’s capabilities approach holds that it is the pressing task of political institutions to structure society so as to secure a life of dignity for every kind of individual.

147. Nussbaum, *Frontiers*, 278; See also, 160.

148. Nussbaum, *Frontiers*, 85 – 86; 157; 221; 412.

I now turn to some of the contract theorists who argue that contract theory can include animals as subjects of justice. I argue that these theorists fail to show that their respective versions of the social contract or the types of social contract that they consider can include them. I begin with Cohen's account.

D. Problems with Cohen's Direct Subject Account

Recall that Cohen's contractors bargain for mutual advantage. In the process, they abide by the pragmatic constraints of fairness and non-coercion. Animals cannot abide by these constraints, and more to the point, it is not advantageous for contractors to try to bargain with them. Yet Cohen insists that contractarianism of the kind he describes can include animals as direct subjects of justice. Moreover, though Cohen does not say which capacities contractors must have in order to be contractors, his arguments presuppose a conception of the person as rationally self-interested bargainer. Cohen rejects the idea that subjects of justice are one in the same with the framers of contracts. Animals cannot be framers of contracts, and so have secondary moral standing. But this does not stop framers who have primary moral standing from including animals as direct subjects of justice.

Cohen's argument that contractarian theories can include animals as direct subjects of justice fails for two reasons. First, Cohen limits the scope of his arguments to a subset of contract theories that do not claim to model moral constraints into the initial choice situation. But as I argue below, the pragmatic constraints these contract theories model are also moral constraints and should be understood as such. Second, given the right understanding of what being a subject of justice means in a liberal society, I argue

that the animals Cohen describes as being ‘direct’ subjects of justice are actually only indirect subjects.

Cohen distinguishes between what he calls contractualism and contractarianism. He calls those theories that model moral constraints into the initial bargaining situation – Rawls’ justice as fairness, for instance – *contractualist*. He calls those that do not model moral constraints into the bargaining situation – among which he takes David Gauthier’s theory as paradigmatic – *contractarian*.¹⁴⁹ Cohen limits the scope of his own arguments to contractarian theories. He explains, “In contrast with constrained versions of the initial situation, the contractarian agreement validating moral norms arrives in an unconstrained context. In other words, moral principles shape neither the context under which contractors agree nor the conclusions that are acceptable.”¹⁵⁰ Fairness and absence of coercion are minimal pragmatic constraints necessary in order for agreement to be possible.

I argue that Cohen’s contractarian view that moral principles follow from purely pragmatic constraints is untenable. Imagine a group of individuals bargaining in an initial choice situation of the sort Cohen describes – one characterized by fairness and an absence of coercion. Suppose also that they agree to the following principle: Each individual is to refrain from harming another unless doing so results in a sufficiently great gain to oneself, which gain should not be understood as limited to self-defense, but including gains of other kinds, such that flourishing does not require them. If the gain is

149. See David Gauthier’s *Morals by Agreement*. Oxford: Clarendon Press, 1986. Nussbaum provides a different kind of argument against contractarian theories than the one I am providing here. See *Frontiers*, 55 – 57.

150. Cohen, “Contractarianism...”, 229.

sufficiently great, one is morally obligated by one's own self-interest to harm others in order to secure it. Would this be a binding moral principle?

In order to better illuminate the conceptual difficulties with Cohen's contractarianism, I suppose that this would not be a binding principle. Cohen's contractarian is unable to reject any principles that are generated under the proper pragmatic constraints. If Cohen's contractarian agrees that the principle is not morally binding, she may conclude that the initial choice situation is in some way unfair or coercive, since contractors would not have agreed to an unjust principle unless the initial choice situation were unfair or in some way coercive. She might cite her own considered judgments in support of her evaluation of the moral principle, but this is not sufficient to show that the initial choice situation really is unfair or in some way coercive.

In order to show that the initial choice situation is really unfair or in some way coercive, Cohen's contractarian must argue that morally binding principles supervene on the proper pragmatic constraints in the initial situation. In order to do this, the contractarian must (1) provide an explanation for why principles are morally binding without appealing to the pragmatic constraints in the initial choice situation, that is, provide a conception of the good; and (2) show empirically that no agreement on these principles is possible without the minimal pragmatic constraints of fairness and freedom from coercion, without appealing to any moral evaluation of the principles chosen.

The empirical constraint (2) is impossible to demonstrate with any degree of certainty. Therefore, the contractarian cannot demonstrate with any degree of certainty that moral principles follow from minimal pragmatic constraints. Moreover, without some moral constraints, the structure of the contract procedure is morally neutral. It can

yield many different conclusions, depending upon which conception of the good grounds the moral principles generated by the procedure, i.e., depending on the explanation one provides for (1). But if this is so, then it is difficult to see why one should think that the kind of contractarianism Cohen describes does a better job of supplying moral principles than other accounts of justice. Whether it does a better job depends on whether the right account of the good is modeled into the initial choice situation.

The contractarian must see the minimal pragmatic constraints of the initial choice situation as moral constraints, if she is to claim that moral principles follow from the proper procedure. Limitations are understood in terms of what they limit. The limitations of fairness and freedom from coercion may limit the kind of initial situation in which agreement is possible, but they also limit the range of moral principles that may be chosen to those which are the result of an agreement reached under those limits. That is, these minimum pragmatic constraints are also functioning as moral constraints. If they were not also functioning as moral constraints, there would be no reason to think that the principles derived from a contract procedure are moral principles, or that the contract procedure is any part of a theory of justice. Nussbaum concurs: “I think it is implausible to suppose that one can extract justice from a starting point that does not include it (ethical constraints) in some form...”¹⁵¹

I now turn to the second problem facing Cohen’s account, namely, that what he defines as ‘direct’ moral status for animals is in fact ‘indirect’ moral status. Recall that for Cohen, what makes direct moral status different from indirect moral status is that

151. Nussbaum, *Frontiers*, 57. Words in parenthesis added. Nussbaum does not herself pursue as detailed an argument for this point as I have, but argues against the impoverished moral character of such accounts on other grounds. She also applauds Rawls for modeling moral constraints into the original position.

direct moral status it is *owed to* the animal in question, rather than to some other being.

Cohen argues that animals have direct moral status on a contract theory when contractors agree to extend to them direct moral consideration – that is, they agree on principles or laws that see the animals themselves as being owed moral treatment.

On a liberal conception of what it means to be a subject of justice – the conception I have been using throughout my project, and one that Cohen and other liberal contract theorists endorse – an individual is valued *for his or her own sake*. *The individual's good, notably the freedom to unfold that good, is the final end*. A life in which this good is secure is *a life worthy of dignity*. Accounts of what an individual's good is, or how to secure the final end of freedom to unfold that good, vary. But the individual is still seen as an end, and political theory as being aimed at securing that end in some way. Working from this liberal conception of what it means to be a subject of justice, one must ask whether contractors agree to treat animals in a particular way *for the animals' own sake*. To the extent that agreement is reached as a means of respecting other human contractors' ends, rather than for the animals' own sake, to the extent that respect for the human contractors' ends is all that is required in order to reach an agreement to include animals, animals are not being included as liberal subjects of justice. This is exactly what happens on Cohen's account.

An analogy should help to make my critique clearer. In arguing against those who hold that contract theory cannot include animals as subjects of justice, Cohen says the following:

The contractarian critic could press here and say that the contractors would not bother to press such demands. Why threaten the contract by insisting on direct moral regard for *dogs*? But note that contractors *might* prefer to do so. Much now depends on the weight of their preferences. Once we have *not* assumed that contractors are necessarily rigidly self-regarding, we can take stock of what contractors prefer... Whether contractors would bother to extend moral standing to *nonhuman animals* would then depend on what their preferences were, how much they knew about their preferences, and how much they knew about human moral psychology.¹⁵²

Cohen's suggestion that animals can be direct subjects of justice on a contractarian account because some contractors might prefer to give direct moral regard to them may seem reasonable. But it is not. To see why, replace each reference to animals in the passage above with a reference to women. When one puts women in place of animals in Cohen's chain of reasoning, it becomes clear just how far his 'direct' justice for animals is from a liberal conception of direct justice.

Men who reason about the moral status of women in the same way that humans reason about the moral status of animals on Cohen's contract are not reasoning about morally valuable beings whose dignity must be protected as a matter of justice. They are only trying to reach an agreement that respects the contractors' (i.e., other men's) preferences. Arbitrary willing from a position of power is made the measure of who has real moral status and whose moral status is merely derivative. Cohen has failed to show that animals can be direct subjects of contractarian justice. It still appears that only contractors can be direct subjects of justice.

E. Problems with Rowlands' Neo-Rawlsian Account

Rowlands says little about the idea that cooperation is self-interested and for mutual advantage, so it is difficult to tell whether he thinks that cooperation must be

152. Cohen, "Contractarianism...", 239.

motivated in this way, or if not, how working toward an agreement in the initial situation might work. He is more concerned with what follows by rational necessity from the principle of liberal equality than he is with the motivation of the contractors. Rowlands sees contractors as highly rational beings – as paradigmatic, fully functioning ‘normal’ humans in the Rawlsian sense of the term. Yet he rejects the idea that the subjects of justice must be the same individuals as the framers of the contract. Thus he does not think the requirement of rationality among the contractors poses a significant obstacle to including animals as direct subjects of justice. Rather, it actually requires such inclusion, since Rowlands’ argument that animals are subjects of justice depends upon an appeal to logical necessity. So in contrast to Cohens’ account, there is no question that animals are direct subjects of justice on Rowlands’ account.

Nevertheless, Rowlands’ account faces some serious problems of its own. The first problem is that Rowlands’ account cannot be fruitfully applied in a Western liberal society.¹⁵³ Rowlands grounds his extension of the Rawlsian social contract framework to include animals in the idea “that possession of a property whose bearer has done nothing to merit, at least itself, confers no moral entitlements on that bearer”¹⁵⁴ – what I call the *not-meriting intuition*. Humans have done nothing to merit their greater mental capacities. Therefore, these capacities do not give us reason to think that they are more morally entitled than animals. So we must see humans and animals as equal moral subjects.

153. Note that a constructivist account does not need to embrace all of the prevalent moral judgments and convictions. Nor does it need to abandon a partial political conception of the good.

154. Rowlands, *Animal Rights*, 142.

Rowlands claims to be drawing this intuition from Western political culture. This should put him squarely in the political constructivist tradition. But it does not. It does not because the not-meriting intuition that is widespread in Western political culture is not the unqualified idea that Rowlands advocates, but a qualified idea that I call the *human not-meriting intuition*. The idea is that possession of a property whose bearer has done nothing to merit, at least in itself, confers no moral entitlements on that bearer *unless* that property is the property of being human. *Being human is a property that entitles its possessor to moral priority even though the bearer has done nothing to merit it.*

We do not have to look far to recognize how common this qualification is. Consider a Chimpanzee and a human infant with average capacities for their age and their respective species. The idea that the human infant has weightier moral entitlements than the Chimpanzee is without question more widespread than the idea that it does not. The fact that the human not-meriting intuition is common in politically liberal society, combined with the fact of pluralism in comprehensive doctrines, is not reason to endorse it. But it is reason enough to consider it when reasoning about what conception of justice we ought to adopt. Yet in spite of this, Rowlands does not consider it when reasoning about his conception of justice. He instead builds a straw man of intuitions that are opposed to his unqualified not-meriting intuition in order to dismiss all such opposing intuitions.

Of these opposing intuitions he states: “These [intuitions] include the idea that we have no direct duties towards nonhuman animals and the idea that nonrational agents are

not full members of the moral community.”¹⁵⁵ Rowlands is right that these ideas are inconsistent with the more basic not-meriting intuition. They are in fact incompatible with the entire project of seeking to include animals as subjects of justice, and therefore ought to be rejected. But many people in Western liberal societies who think species membership is morally relevant do not therefore think that they have no direct duties toward animals or that nonrational agents are not full members of the moral community. On the contrary, many think that at least some animals are full members of the moral community to whom we have direct duties, but that these duties are less weighty than the duties we have toward human beings. That is, they share the *human* not-meriting intuition, rather than Rowlands’ unqualified not-meriting intuition.¹⁵⁶

Moreover, Rowlands’ neo-Rawlsianism is too egalitarian. What kind of political principles might one choose in Rowlands’ modified original position? He convincingly argues that so far as it is connected with the practice of raising animals for human consumption, animal husbandry would be ruled out by whatever principles are chosen. This follows from the thought that one would rather forgo the pleasure of eating meat and the nutrition it provides than be raised, killed, and eaten by other creatures.¹⁵⁷ The principles chosen would shape a society of vegetarians. Rowlands also addresses the counterargument to abolishing animal husbandry – that this abolition would impose

155. Rowlands, *Animal Rights*, 142.

156. In chapter 5 I will argue that the human not-meriting intuition, rightly understood to include animals as direct subjects of justice in this way but not as equally valuable subjects, can be grounded in the human form of life. I will further argue that such a ground is not necessarily speciesist.

157. Rowlands also makes the more controversial argument that the human practice of raising animals to consume them is an injustice that is analogous to human slavery. I will not go into detail on his arguments here. I will only say that there are multiple disanalogies between the two cases and the issue is more complex than Rowlands makes it out to be. I will explore some of these complexities in the next chapter.

undue economic hardship on those whose livelihood is tied up with the practice. He insists that such economic considerations are not relevant in the original position: “the direction of economic resources and the resulting character of economic relations are themselves open to negotiation in the original position.”¹⁵⁸

But Rowlands’ arguments about how we ought to treat predator and prey as subjects of justice are less than convincing. It might appear, Rowlands admits, that contractors in the original position would affirm a duty to assist prey animals out of fear that they may be prey. But he is confident that this fear is balanced out by other considerations – that we may end up predators instead of prey, and therefore, would need to kill to survive, and that if predators aren’t allowed to kill prey, prey will end up starving due to overpopulation. Hence, Rowlands concludes with the old familiar refrain: “Let them be!”¹⁵⁹

If contractors know empirical facts about the sciences behind the veil – facts located in economic theory, psychological theory, natural sciences and the like – then facts about the ecological order are not veiled, either. Therefore, if sentient animals are subjects of justice, then all relationships between sentient creatures within the political boundaries of Western liberal societies are up for negotiation in the original position, so far as this is empirically possible. This includes ecological relations between predator and prey. It is not hard to imagine contractors agreeing to remove predators from ecosystems and to use only nonviolent means of population control for prey living in ecosystems without predators and nonviolent means of feeding predators, so far as this is possible.

Given Rowlands’ strict interspecies egalitarianism, if contractors chose to prohibit

158. Rowlands, *Animal Rights*, 157.

159. Rowlands, *Animal Rights*, 153.

nonhuman predators from hunting and killing their prey, they would also have to choose to prohibit humans who hunt and use animals for basic subsistence, such as the Inuit, from hunting and killing animals. At least it is not clear why they wouldn't do so for human carnivores if they were willing to do so for nonhuman ones, given Rowlands' strictly interspecies egalitarian stance. This implication is problematic not only for the practical reason that it goes against the human not-meriting intuition, but also for deeper philosophical reasons that I will consider in chapter 6.

Rowlands might avoid these problematic implications by excluding information about the population dynamics of species in ecosystems from behind the veil. He might support this exclusion on analogy with Rawls' exclusion of information about the probability that one will be in this or that position in society: Just as information about the probability that one will be in a particular position in human society is excluded behind the veil, so, too, is information about the likelihood that one will occupy a particular niche or be a predator or a prey, and so on. Even so, it is not clear how the principles chosen could possibly be fair to both predator and prey, given that the one can only flourish by blocking the flourishing of the other. This kind of unfairness in nature is not the result of any unjust social structure that can be changed. Rather, it is constitutive of a material reality that transcends human social structures and morals.

From the forgoing arguments, I conclude that Rowlands' modified original position models a more egalitarian interspecies conception of justice than he thinks it does – one that is more egalitarian across species lines than it ought to be. Nor is his an account that most citizens in Western liberal societies could endorse.

F. Problems with Smith's Account of the Social Contract

Nussbaum's argument from the circumstances of justice does not apply to Smith's account, since Smith thinks we must begin with the social structures that are already present in Western liberal societies rather than by imagining what circumstances would be necessary for a just society. And although Smith does not provide a clear conception of a person, she seems to have in mind something more akin to what Nussbaum has in mind than what Cohen, Rawls, and most others in the contract theory tradition have in mind. Thus Nussbaum's argument from the conception of a person does not apply to Smith's account.

Smith also agrees with Rowlands that animals are subjects of justice even though they cannot be framers of a contract, and she agrees with him that animals are subjects of justice in the liberal sense of the term. But unlike Rowlands, Smith's policy conclusions are consistent with the human not-meriting intuition, so her account is not objectionably egalitarian. In each of these ways Smith's account seems superior to those so far considered. But I argue that Smith's account has a serious flaw of its own.

Smith abandons the idea of an abstract initial choice situation and with it, all attempts to model equality or to ground justice in philosophical principles. She does this because she thinks that "equality (of humans or of all beings with moral status) is not a useful principle for defining the boundaries of the political community, because it gives us no boundaries. Probably no philosophical principle is going to do better."¹⁶⁰ In place of an initial choice situation abstracted from the way things really are, Smith proposes that we take the way things really are as our initial choice situation – the way things

160. Smith, *Governing Animals*, 60.

really are in, say, the United States (Smith chooses to focus on American society in *Governing Animals*). She characterizes her account as ‘midrange’ between theory and practice and asserts that an overlapping consensus on the idea ‘that some animals are members of the social contract...[is] a sufficient social foundation for animal welfare policy.’¹⁶¹

This new way of understanding the initial choice situation leads Smith to define membership of animals in the political community in purely empirical terms. In order to be a member of the political community, (1) “the animal must be recognized by humans as a subject of justice and as enjoying something we can call freedom. That recognition – an empirical matter – depends on humans’ capacity for empathy and understanding, the limits of which have yet to be discovered...”;¹⁶² and (2) the state must govern “animals directly (when government officials use animals to perform official functions or directly manages the animal population) and indirectly (by specifying what private individuals may do to animals).”¹⁶³

It is helpful here to distinguish between two strains of thought that are prominent in Smith’s thinking: what I call the ‘empiricalized political’ strain and the ‘relativized moral’ strain. The *empiricalized* political task that Smith describes is to track the conclusions at which individuals arrive in their moral deliberations and then to codify them into law insofar as a consensus on these conclusions is possible. One determines which individuals should be seen as members of the political community from the

161. Smith, *Governing Animals*, xiv.

162. Smith, “Animals and the Social Contract,” 206. Number added.

163. Smith, “Animals and the Social Contract,” 206. Number added.

political perspective by asking which individuals the political community regards as being members of its community and which are currently protected by its laws. Thus, in Western societies like the United States, companion animals such as dogs and cats are [in some capacity] members of the political community, whereas ‘wild’ animals are not.

One determines what just treatment consists in for members of the political community in the same way – by consulting what individuals actually think. This understanding of the political enables Smith to give humans weightier consideration than animals in determining public policy, affirming, for instance, that animals raised for food and research animals are members of the political community, while also insisting that animal husbandry and animal research should continue [with the caveats that these must be carried out in a way that is respectful of animals].¹⁶⁴

The *relativized* moral task, on the other hand, as Smith conceives it, is to work to bring institutions and policies more in line with one’s vision of the way a society should be. One cannot change institutions or policies in a liberal society by “deducing conclusions from basic philosophical principles but by showing that a policy or institution is better than the alternatives, all things considered. [Such contextual justifications rather] rely principally on rich descriptions of what the world might look like if we choose one course of action over another.”¹⁶⁵ If a consensus is achieved on one’s favored vision of institutions or policies, the boundaries of justice change so that they are more in line with one’s own conception of the good. But this is not movement closer to or farther away from ‘truly’ just principles. It does not even make sense to speak

164. See *Governing Animals*, 63 – 66 and chapter 6 of that book for Smith’s affirmation of these practices.

165. Smith, *Governing Animals*, 60. Bracketed words added.

this way. It is rather movement to different or modified institutions or policies that members of a society agree to call 'just' in lieu of the old ones.¹⁶⁶

Smith's political liberalism is dangerously empiricalized and relativized. Consider two quick reductions implied by her account:

(1) *The case of the currently racist society*: If most people in a liberal society see individuals of a particular minority race as not being subjects of justice, and there are therefore no laws regarding them, then by Smith's empirical definition of membership in the political community, they are not members. Since they are not members, members do not owe them just treatment. Indeed, members cannot treat them justly or unjustly. But this is clearly false.

(2) *The case of the becoming racist society*: If most people in a liberal society see individuals of a particular minority race as being subjects of justice, and there are therefore laws protecting them, then by Smith's empirical definition of membership in the political community, they are members of the political community. But suppose a small number of the majority race in that society convince a majority of its citizens that this minority race should not be subjects of justice. The citizens then remove all laws regarding just treatment of the minority race. In this case, individuals of this minority race are no longer members of the political community on Smith's empirical definition of membership. Members therefore no longer owe them just treatment. Indeed, members cannot treat them justly or unjustly. But this is clearly false.

166. Smith wrongly interprets Nussbaum as holding that we only need an overlapping consensus on the view that animals are subjects of justice in order for them to be subjects of justice. But Nussbaum actually holds that we also need a political conception of the good, a good that is not only a way to recognize value, but that also grounds it. This provides the raw normative material for the consensus. See "Animals and the Social Contract", 203.

Smith cannot judge that society 1 is unjust on her version of social contract theory. Nor can she judge that society 2 is unjust when it becomes like society 1. She cannot judge that society 2 becomes less just when it becomes like society 1. She cannot make sense out of the idea that individuals of the minority race in each society can be treated unjustly even if others fail to regard them as subjects of justice. It cannot do any of these things that a politically liberal theory must do. Something is wrong with Smith's account of justice.

I argue that Smith's account is flawed in that it does not include a conception of the *political good* by which empirical states of affairs in a society can be judged just or unjust without appealing to those very states of affairs. Smith is aware that her account does not include such a good: "Of course, because contextual argument appeals to empirical descriptions of the way the world is and the way it could be, it is always conditional; it doesn't offer conclusions that hold for all times in all places. So it doesn't promise to end the political debate for good."¹⁶⁷ She hastens to add that this is a good thing, noting that "debates about which animals should be treated as members of the social contract are prime opportunities for minority views to be aired and to influence our public philosophy."¹⁶⁸

Smith sometimes says things suggesting that the right starting point for reasoning in a social contract is not entirely the same as the way things really are on the ground – i.e., that she is working with a conception of the political good. In one place she says that "Social contract reasoning instructs us to look at the situation from the animal's point of

167. Smith, *Governing Animals*, 61.

168. Smith, *Governing Animals*, 61.

view.”¹⁶⁹ Elsewhere she states that the social contract is aimed at “promoting the welfare of all members of the community”¹⁷⁰; and that “the contract...must include all the members whose welfare normally affects other members.”¹⁷¹ These statements can only consistently best taken, however, as reflective of strands of thinking that are already present in liberal political culture. They are Smith’s own relativized moral convictions, aimed at changing what is seen as just by the citizens of the United States, that is to say, to change what is ‘just.’

I agree with Smith that contextual argument is important and that moral deliberation in a liberal society is generally a good thing. But these arguments and debates must proceed against the backdrop of a political conception of the good that is able to judge certain very fundamental matters across time and space within liberal cultures. In societies characterized by metaphysical and moral pluralism, on liberal political theory, such a conception cannot be metaphysically and morally comprehensive. This would violate the moral autonomy. But it can and must identify a subset of moral values as politically basic. A liberal conception of the political good is one that gives the good of the individual priority in its moral judgments, and values autonomy as an especially important part of this good. Accounts of what a liberal conception of the political good should look like and what judgments it must entail vary. But it certainly must include an unconditional condemnation of racism and sexism and other dignity-violating ways of thinking and acting.

169. Smith, *Governing Animals*, 56.

170. Smith, *Governing Animals*, 49.

171. Smith, *Governing Animals*, 49.

Nussbaum's political conception of the good is a good example of the kind of liberal conception that Smith needs. Nussbaum's intuitive judgment that it is good for individuals who are capable of flourishing to have the opportunity to do so is substantive enough that people ascribing to a variety of metaphysical doctrines can see why the individuals involved are subjects of justice on the account, and can affirm that they are subjects of justice. Nussbaum does not claim that the moral value of flourishing is contingent on what people now think. She claims that it is morally valuable in any event and that protecting it is a matter of justice. The consensus on the idea that flourishing is of moral value does not *make* it morally valuable or protecting the opportunity to flourish a matter of justice. It justifies the use of coercion to ensure that the opportunity to flourish is protected.

Assuming that Smith were to affirm some partial political conception of the good, what ground might she choose? At one point Smith approvingly cites Mary Midgley and Mary Anne Warren's approach to moral considerability,¹⁷² suggesting that "there may be multiple bases (and not a closed set) for being naturally free in a political sense. Some are free because they are rational; others are free because they are sensitive, aware, and guided by highly adaptive strategies."¹⁷³ Smith might develop an account of moral equality grounded in a more expansive concept of freedom like this one. Because many animals that are not rational are nevertheless sensitive, aware, and guided by highly adaptive strategies, they can be admitted into the contract on this basis, rather than being excluded. This concept of freedom identifies a class of individuals that is remarkably

172. See Mary Midgely's *Animals and Why They Matter* USA: Thompson-Shore Inc., 1983, and Mary Anne Warren's 1997 book *Moral Status: Obligations to Persons and Other Living Things* (Oxford: Clarendon Press).

173. Smith, "Animals and the...", 202.

close to that Nussbaum identifies as being capable of flourishing and living a life worthy of dignity.

If Smith were to model moral equality on this concept of freedom, her account would be a normative theory of justice, no longer appealing to current states of affairs to determine moral principles, but critiquing those states of affairs in accordance with moral principles. But even if she were to do this, her account – all social contract theories, for that matter – would still face what I call the *problem of morally relevant inequalities*: That is, it will either be overly egalitarian, as Rowlands' account is, or it will exclude at least some animals from direct moral consideration. In section D of chapter 6 I will make the case that the problem of morally relevant inequalities afflicts all social contract theories, whatever their individual merits might be.

G. Conclusion

In this chapter I have outlined Nussbaum's major arguments that social contract theory cannot include animals as subjects of justice. I have argued that two of Nussbaum's arguments deal serious blows to Rawls', Carruthers', and Scanlon's theories, as well as to Hobbes' and Locke's classical accounts. But I have also argued that Nussbaum's critique of social contract theory does not show that *no* social contract theory can include animals as subjects of justice. In order to strengthen the case against contract theory, I have further argued that three significant attempts to include animals in social contract theory – Cohen's, Rowlands', and Smith's accounts – have failed, each for their own reasons. In the final chapter of my project, I will argue for the bolder and more

general conclusion that no social contract theory can include animals as subjects of justice.

In the next chapter I will examine the works of two of the most widely read animal ethicists, Peter Singer and Tom Regan, both of whom ground our moral responsibilities toward individuals in the capacities they actually have. I will also look at how our moral responsibilities toward animals can be grounded in our relationships with them, rather than in the capacities individuals actually have. To this end I will examine three ways in which such relational grounds have been worked out: our affective ties with animals in Mary Midgley's work, our encountering others as intentional, communicative beings in Val Plumwood's, and the causal impacts of our actions on others' opportunities to flourish in Clare Palmer's. Later I will draw on these accounts, particularly Plumwood's and Palmer's, in developing my own version of the capabilities approach.

CHAPTER 5

CAPACITIES ACCOUNTS AND RELATIONAL ACCOUNTS IN ANIMAL ETHICS

ABSTRACT

In my project I argue that my version of the capabilities approach provides a better framework for including animals as subjects of justice in Western liberal societies than Martha Nussbaum's version of the approach, Tom Regan's animal rights, Peter Singer's animal welfare, or any social contract theory. I first lay out Nussbaum's capabilities approach. Then I examine several versions of the social contract, highlighting a number of reasons that animals cannot be included as subjects of justice on a social contract theory. After this I consider Regan's animal rights and Singer's animal welfare accounts, as well as Val Plumwood's egalitarian account of the intentional other, Mary Midgley's affective account, and Clare Palmer's causal history account of our responsibilities toward animals. Drawing on Plumwood's and Palmer's work, in the last section, I craft a version of the capabilities approach that departs radically from Nussbaum's version in two ways. First, on my approach, individuals are valuable by virtue of their form of life, rather than by virtue of the capacities they actually have. Second, following Palmer, I hold that our responsibilities toward them are partly determined by the ways in which we have made them vulnerable to harm, rather than only by the overriding moral directive to provide every individual the opportunity to flourish. I argue that these components of my account enable it to avoid critical problems that Nussbaum's account, Regan's animal rights, Singer's animal welfare, and social contract theories cannot.

In this chapter I outline some major approaches to animal ethics. I begin with *capacities accounts* – accounts that see animals’ moral worth and our moral responsibilities toward them as being grounded in and determined by the capacities they have *as individuals*. I examine the two most influential capacities accounts – Tom Regan’s animal rights theory and Peter Singer’s animal welfare. Most other capacities accounts more or less resemble their accounts. In the final chapter, I will critique Regan’s and Singer’s theories and capacities accounts more generally. Building from this critique, I will argue that life-form accounts – accounts that see animals’ moral worth and our moral responsibilities toward them as being grounded in and determined by their form of life – provide a better framework for moral worth and responsibilities. This counts in favor of my version of the capabilities approach, as it is life-form account through and through.

In the second part of this chapter, I examine three *relational accounts* – accounts that see our moral responsibilities toward animals as being grounded in or at least partly determined by some aspect(s) of our relationships with them – that I find particularly compelling. I examine Mary Midgley’s account of a mixed human-animal community, Val Plumwood’s account of dialogical relations between beings, and Clare Palmer’s causal account. In the final chapter I will argue that any adequate animal ethic must adopt methodological egalitarianism – a kind of egalitarianism that is present in the work of many authors, including Regan, Nussbaum, and Midgley – but that receives particularly perspicacious treatment in Plumwood’s work. I will also incorporate Palmer’s causal account of our moral responsibilities toward animals into my version of the capabilities approach. The resulting capabilities approach tells us to leave wild animals living ‘in the

wild' be for reasons that are more direct and less question-begging than Nussbaum's version of the approach, Regan's animal rights, or Singer's animal welfare.

A. Tom Regan's Animal Rights

In his book *The Case for Animal Rights*,¹⁷⁴ Tom Regan grounds individuals' moral worth in their capacity to consciously experience life. He does not rule out the possibility that minimally sentient animals or even plants might have moral worth, but argues that a sufficiently developed capacity to consciously experience life is a *sufficient* ground for having moral worth. Regan calls individuals that have this more developed capacity *subjects-of-a-life*. Subjects-of-a-life have:

beliefs and...desires; perception, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference and welfare interests; the ability to initiate action in pursuit of their desires and goals; a psychophysical ID over time; and an individual welfare in the sense that their experiential life fares well or ill for them, logically independently of their utility for others...and of their being the object of anyone else's interests.¹⁷⁵

According to Regan, being a *subject-of-a-life* grounds moral worth in three ways. First, being the subject-of-a-life is a sufficient ground for moral worth because it is inherent to the individual, and it is a property that animals have categorically. An animal either has or does not have the capacity to experience life in this way, and each animal who has this capacity is a moral equal. Second, and relatedly, the subject-of-a-life criterion for moral worth explains why both moral agents and moral patients have moral worth. Both have moral worth because both have a sufficiently developed capacity to

174. Tom Regan, *The Case for Animal Rights*, Berkeley: University of California Press, 2004. Originally published in 1983.

175. Regan, *The Case*, 243.

consciously experience life. Third, being a subject-of-a-life grounds moral worth because it explains why we do not have direct duties to those who are not subjects-of-a-life: We do not have duties to them because they are not subjects-of-a-life.

Regan further argues for what he calls *the respect principle*. According to the respect principle, “*we are to treat those individuals who have inherent value in ways that respect their inherent value.*”¹⁷⁶ The respect owed to individuals with inherent value is non-fungible: It is owed to each individual who has inherent value by virtue of their having that value. Since each subject-of-a-life has equal inherent value, it is wrong to harm or kill any subject-of-a-life in order to obtain the best consequences. The respect principle, Regan insists, meets all of the criteria for a valid ethical principle. It is consistent in that it treats all moral subjects in the same way, it is adequate in scope in that it applies to all moral subjects, and it is sufficiently precise in that it makes clear and intelligible what it requires and matches a broad range of our intuitions.

For Regan, a *right* is a claim against another to be given what one is owed. A rights claim is *valid* if it can be satisfied and if those satisfying it actually owe it. Regan calls individuals who are able to satisfy rights claims *moral agents* and those who are not *moral patients*. It follows from the respect principle that all moral subjects have rights claims, and from the fact that all moral agents are able to satisfy these claims, it follows that all moral agents must respect these claims (i.e., the respect principle is normative for all individuals who are capable of respecting moral patients). Further, our duty to treat animals respectfully includes “a *prima facie* duty to assist them when others [moral

176. Regan, *The Case*, 248.

agents] treat them in ways that violate their rights.”¹⁷⁷ This, too, is a part of respecting their inherent moral worth.

Regan derives the *harm principle* from the respect principle. According to the harm principle, since harming an individual disrespects their inherent worth, “*we have a direct prima facie duty not to harm individuals.*”¹⁷⁸ This duty can be overridden, however, when rights claims are in conflict with one another. Regan argues for two additional principles that tell us how to proceed when rights conflict. These principles follow from the idea that each individual has equal inherent worth and is therefore, per the respect principle, equally deserving of respect.

According to the *miniride principle*, “special considerations aside, when we must choose between overriding the rights of the many who are innocent or...of few who are innocent, and when each affected individual will be harmed in a prima facie comparable way, then we ought to choose to override the rights of the few” rather than those of the many.¹⁷⁹ The *worse-off principle*, on the other hand, tells us that when harms are not prima facie comparable, we ought to act so as to minimize the harm brought to any one individual, unless some special considerations tell against it. Special considerations that can override the miniride or the worse-off principle include voluntarily acquired duties and tacit consent to being made worse-off. We tacitly agree, for instance, to abide by the rules of economics when we buy products or run a business. It is not a violation of the

177. Regan, *The Case*, 282 – 83.

178. By “direct” Regan means that the duty is owed to the individual who might or might not be harmed.

179. Regan, *The Case*, 305.

worse-off principle when a business fails or the price of a product goes up, even though these things can make many people worse off.

The last major principle Regan derives from the respect principle is the *liberty principle*. Respecting individuals requires granting them the freedom to pursue their own welfare, even when this makes others worse-off. Hence, individuals have a right to pursue their own welfare, even when this makes others worse-off. But this freedom is limited. It does not include the right to disrespect others – some ways of being made worse-off are not only inconvenient but plainly disrespectful. One may not, for instance, torture a subject-of-a-life in order to increase one's own welfare. There are also special considerations that override the freedom to pursue one's own welfare. Property rights must for instance be taken into consideration. And one may not steal or damage another's justly acquired property in the pursuit of one's welfare.

Regan is primarily concerned with inherent value. But he also discusses the *intrinsic value* of an individual – that is, *the value of an individual's experience*, as opposed to the value that inheres in the individual by virtue of having a sufficiently developed capacity to consciously experience life. An individual's intrinsic value does not usually play a role in moral decision-making. But when one of the parties involved in an ethical dilemma must die so that the other may live, Regan argues that intrinsic value comes into play.

Regan invites the reader to imagine that four people¹⁸⁰ and a dog are trapped on a lifeboat, and that one of these five individuals must be thrown overboard so that the others may survive. Though the dog is just as inherently valuable as any of the people,

180. By "people," Regan seems to mean normally functioning adult humans.

Regan claims that the dog is less intrinsically valuable, since its experience is less valuable than the experience of any given person.¹⁸¹ Regan puts this in terms of the potential welfare of the persons. A persons' welfare, understood as valuable experiences, is greater than that of a dog's. Regan concludes that the dog ought to be thrown overboard. This would be so whatever the number of dogs and whatever the number of people are on the boat. Importantly, Regan insists that this application of intrinsic value as a moral tiebreaker in conflict situations is only permissible in exceptional cases, though he says little about what constitutes an exceptional case.

Regan takes an abolitionist stance toward all forms of animal agriculture and the associated practice of meat-eating. Healthy diets do not need to include meat, and the harm caused by depriving a person of meat to cook or to eat is trivial compared to the harms visited upon animals in factory farms, or the harm of killing them in *any* context. Moreover, we do not owe it to farmers, or anyone else who gets their economic livelihood from animal agriculture, to continue supporting it because the rules of economics are a special consideration that overrides the worse-off principle (see earlier discussion of the miniride and worse-off principles).

Regan also takes an abolitionist stance against all forms of animal research. Vivisections of mammals for educational purposes cannot be justified. Whether or not the vivisected animal is under anesthesia, it will die, and all of the educational benefits of the practice can be just as easily obtained through other educational mediums, such as books. Neither should animals for which there is still some question as to whether they are

181. Regan seems to think that the intrinsic value of a person's experiences is greater than the dog's because these are more complexly sentient experiences. This at least partly parallels Singer's reason for valuing human lives more than those of other animals, though here Regan consigns it to a much more restricted, secondary role in his account. See the next section of this chapter for Singer's account.

subjects-of-a-life – frogs, for example – be vivisected, since too much is at stake (i.e., the animal’s life) if they actually are subjects-of-a-life. Moreover, toxicity tests are often done for chemicals that are already widely known to be dangerous if misused, and analogues to new chemicals or products are generally easy to come by, so that there is no pressing need to continue churning out [and testing] new ones.

Medical research on animals and research aimed at better understanding animal biology or the etiology of disease processes must also be stopped. Arguments in favor of these practices generally appeal to morally better outcomes for support: human or animal health benefits, or economic benefits and the like that may accrue from performing the research. But morally better outcomes can never justify violating an individual’s rights. And by using animals as tools to satisfy human ends, the researchers are violating their rights. As Regan puts it, “the benefits these tests have for others are irrelevant...since the tests violate the rights of the individual animals.”¹⁸²

Regan argues that we ought not to get involved with wild animals’ lives if they are living in the wild. However, Regan further argues that we have “duties of assistance grounded in a general *prima facie* duty of beneficence.”¹⁸³ Only humans of normal cognitive capacity and over a certain age have moral agency, and only rights claims against moral agents can be valid. Therefore, no human moral patient or animal can claim any right against other animals, and no questions of morality or justice arise in the relationships that wild animals have with one another and with their environment in the wild. Those harms caused by inanimate forces or moral patients are *amoral*. This means

182. Regan, *The Case*, 381.

183. Regan, *The Case*, xxxvi.

that we have no responsibility to stop predators from attacking prey, or to get involved in any other way in the interactions between wild animals and between wild animals and their environment.¹⁸⁴ We are however excluded from hunting or otherwise harming wild animals for sport or for pleasure. We are only ever justified in killing or harming wild animals when they will not leave us be, that is, for the purposes of self-defense.

Regan argues that the *prima facie* duty of beneficence applies to human children (and presumably human moral patients more generally) but not to wild animals, since human children lack the kind of competence that enables them to survive without assistance, whereas wild animals have this competence. Regan explains: “if members of prey species, including the young, were unable to survive without our assistance, there would be no prey species. And the same applies to predators.”¹⁸⁵ But numerous species of predator and prey populate the earth today. Therefore, we know that individuals of these species are competent at survival. In contrast, “someone who placed young children in the woods or on an ice floe, the better to provide them with the ‘opportunity to live their own life by their own lights, as best they can,’ would be judged criminally irresponsible...”¹⁸⁶ Regan concludes that we should leave wild animals be when moral patients attack them, but we should assist human children (and presumably other human moral patients) when they are attacked.

184. Regan also develops a series of ancillary arguments against prevailing practices in wildlife management. He argues, for instance, that hunting and trapping animals to control their populations may cause just as much harm to the animals as starvation would.

185. Regan, *The Case*, xxxvii.

186. Regan, *The Case*, xxxviii.

B. Peter Singer's Animal Welfarism

In his book *Animal Liberation*, Peter Singer argues that an animal must be able to experience pleasure or suffer pain in order to be a subject of moral consideration, and that we have moral responsibilities toward animals because they can experience pleasure and suffer pain. First, there is nothing to consider, morally, if an animal does not have any interests. Therefore, all morally considerable animals have interests. Moreover, “the capacity for suffering and enjoyment is a prerequisite for having any interests at all...”¹⁸⁷ It follows that the capacity to suffer pain and to experience pleasure is a *necessary condition* for being a subject of moral consideration. Second, every individual that is capable of experiencing pleasure or suffering pain has an interest in seeking the former and avoiding the latter. Therefore, the capacity to suffer pain and to experience pleasure is also a *sufficient condition* for being a subject of moral consideration.

Furthermore, Singer holds that equal interests ought to receive equal moral consideration, regardless of whose interests they are. He calls this *the principle of equality*. A rat's interest in not experiencing the physical pain of a beating, for instance, may be just as great as that of a normal adult human being. Assuming that this is so, then the rat's and the normal adult human's interest in not being beaten must be equally considered. Also, many of the interests that normal adult humans have are quite different from those that rats have, and these are quite different from the interests that human infants or coyotes have, and so on. Any complete consideration of interests in making a decision on how to act, say, to stop a rat or a normal adult human from being beaten

187. Peter Singer, *Animal Liberation*, New York: Harper Collins, 2002, 7. Originally published in 1975.

when one cannot stop both must take into account many other interests and consider how these weigh against each other.

In *Practical Ethics*, Singer observes that normal adult humans have the capacity to conceive their own future and to have longer-term desires for their future, including the desire to continue living. Because they have this capacity, but less complexly sentient animals do not, Singer holds that normal adult humans have an interest in continuing to live that less complexly sentient animals do not. Because killing normal adult humans harms them by preventing the satisfaction of these future-oriented desires, but it does not harm less complexly sentient individuals in this way, killing the normal adult human is a greater harm to the human than killing a less complexly sentient individual is to that individual.¹⁸⁸ The final goal of any moral consideration of interests is to determine which action, on the balance, will lead to the greatest aggregate satisfaction of interests for all of the individuals affected by the action.

Singer argues that we must stop experimenting on animals. Both human infants and some severely cognitively impaired humans *and* rats and Chimpanzees have a similarly strong interest in not suffering through the experiments. If we consider equal interests equally and take into consideration all of the interests involved (not just the interests in not being experimented on), it is clear, according to Singer, that we will not be maximizing interest satisfaction if we experiment on any of the individuals affected. The aggregate interest satisfaction of those who would benefit from such experimentation is less than the painful and inhumane blocking of interests of those who would be subject

188. See Peter Singer, *Practical Ethics*, 2nd Edition, New York: Cambridge University Press, 2008, 94 – 97; 194.

to the experiments. Therefore, Singer concludes that we ought not to experiment on any of them.

Likewise, Singer argues that we ought to stop raising animals for food. In Western liberal societies, the practice of factory farming causes great suffering throughout the [often short] lives of the animals raised on these farms. In contrast, the human interests in the practice of factory farming are relatively trivial – eating meat that tastes good or wearing fashionable fur-lined coats and the like. Equal consideration of interests therefore requires that these trivial human interests be sacrificed so that the animals' interest in not suffering and not dying to supply humans with these luxuries can be satisfied. Consequently, the practices of factory farming and of eating meat from animals raised on such farms cannot be justified.

Nor does Singer think that it is permissible to eat meat from animals raised under free-range conditions that give them a pleasant life with a minimum of suffering before they are painlessly killed. This would be an improvement, to be sure, but it would not maximize interest satisfaction of those affected by the practice. For the most part, maximizing interest satisfaction requires not raising animals to kill and eat them under any circumstances. Singer thinks however that humans' interest in not starving is great enough to justify killing animals for food. He thinks that human beings living in hostile environments where eating meat is necessary for survival are not doing anything wrong when they kill animals and eat them.

In addition to developing a positive account of our moral responsibilities toward animals, Singer makes frequent use of arguments from marginal cases in order to highlight what he sees as an unjustified bias in favor of humans. He calls this unjustified

bias *speciesism*. He notes, for instance, that while we are perfectly willing to experiment on rats and Chimpanzees and other animals that have similar capacities to young children or severely cognitively impaired humans, we are horrified by the idea of performing these same experiments on young children or severely cognitively impaired humans. But since both the animals and the humans in this case have similar capacities, there is no justification for giving one group moral priority over the other. Therefore, we ought not to give moral priority to one over the other. We ought to rather treat the marginal case of the Chimpanzee as a straightforward case of moral concern, just as we do with small children and severely cognitively impaired humans.

Specieisists have offered many grounds for the purported difference in moral value between individuals of different species. Some of them have claimed that animals are not sufficiently rational or cannot use language, and therefore cannot be a part of a human moral community, others, that they do not have souls and therefore are not morally considerable, and so on. According to Singer, every one of them fails.

Some fail because some animals have the capacities in question or some humans do not, as the comparison between the normal adult Chimpanzee and the young child or severely cognitively impaired human being demonstrates. Recent ethological studies have shown that the range of species that have what have historically thought of as uniquely human capacities, and the degree to which they have them, is far greater than we had once thought.¹⁸⁹ But even so, Singer maintains that these capacities do not give us any reason to think that the individual who possesses them is morally considerable but the

189. See, for instance *Wild Justice: The Moral Lives of Animals* by Mark Bekoff and Jessica Pierce (Chicago: The University of Chicago Press, 2009) or another of Bekoff's books, *Animal Passions and Beastly Virtues: Reflections on Redecorating Nature* (Philadelphia: Temple University, 2006), or B. A. Dixon's *Animals, Emotion & Morality: Marking the Boundary* (Amherst, NY: Prometheus Books, 2008).

one that does not is not.¹⁹⁰ If the individual has an interest in not suffering pain, that is enough. Finally, some of the grounds speciesists offer fail because they do not exist. Theistic souls and Aristotelian forms of life, for instance, are ontological fictions. Singer concludes that any moral bias in favor of one's own species is unjustified.

C. Mary Midgley's Mixed Human-Animal Community

In her books *Animals and Why They Matter* and *The Ethical Primate*, Midgley argues that the exercise of human social nature creates a variety of emotional bonds that ground our moral responsibilities. She draws insights from ethology, biology, anthropology, sociology, and other scientific disciplines to get an idea of what human and other animals' social nature looks like. From these sources, Midgley argues that human social nature clearly includes, among much else, a *preference for other humans*. This preference is not, "like race-prejudice, a product of culture. It is found in all human cultures and in cases of real competition tends to operate very strongly."¹⁹¹ Midgley argues that some kinds of preference for other humans are good.

Young humans, for instance, must have sufficiently rich and diverse social interactions with other humans, particularly with parents who love them,¹⁹² in order to develop into healthy adult human beings. Midgley observes that children who are neglected or left to be raised by animals, for instance, suffer great psychological,

190. Here Singer echoes Jeremy Bentham: "A full grown horse or dog is beyond comparison a more rational, as well as a more conversible animal, than an infant of a day, a week, or even [a] month old. But suppose the case were otherwise, what would it avail? The question is not 'Can they reason?' Nor, 'Can they talk?' But, 'Can they suffer?'"

191. Midgley. *Animals*, 104.

192. By "parents" I mean anyone who has assumed primary responsibility for the care and well-being of a child or children.

emotional harm, as well as serious cognitive deficits as a result. In contrast, humans do not suffer nearly as much deprived of contact with individuals of other species in their formative years. It is therefore good to prioritize caring for human children over and above caring for individuals of other species. In this case, the preference for other humans directs us to interact with them in ways that are necessary for human well-being. It is therefore a good thing in these cases.

Much the same is true for the healthy development of any social animal into maturity. A duck that is raised by other animals, for instance, cannot behave in all of the ways its foster species behaves, nor will it know how to interact properly with members of its own species. Even if the duck is quite content with its other-species companions, Midgley maintains that it “will actually miss a great deal, because a whole range of its social capacities will never be tapped. A solitary duck reared among chickens will never get the clues it needs to perform many of its central behavior-patterns...In some ways, too, it keeps getting itself misunderstood.”¹⁹³ It is therefore a good thing for a duck to be raised by other ducks, and so on, for each animal to prefer the company of and to be raised by others of its own species.

While intraspecies relationships are particularly important for human individuals’ well-being, Midgley also maintains that social animals can and often do form close bonds with individuals of other species. The most obvious example of social animals with whom we often form close bonds in modern Western societies is the ubiquitous household pet. Midgley also notes that sometimes researchers form affectionate bonds

193. Midgley, *Animals*, 105 – 106.

with their research subjects in “wild” surrounds. And people in non-Western cultures often feel a deep kinship for animals that represent their respective clans.

According to Midgley, close affectionate bonds are not an impediment to objective moral reasoning or a source of unjustified bias. Rather, they are a ground for moral responsibility. We have special moral responsibilities to care for those with whom we form close emotional bonds *just because* we have these kinds of bonds with them. Caring for those with whom we form such bonds is an important part of human social nature and well-being.

Although we are not alone in our capacity to form affectionate bonds, normal adult human beings possess this capacity to a unique degree. Within relationships that are characterized by close affectionate bonds, we often seek the good of the other so far as we are able. These relationships are not merely instrumental. Whatever the evolutionary implications of such social bonds may be, as a social and psychological fact, they include considerable altruism.¹⁹⁴ Midgley also suggests that our greater capacity to form affectionate bonds is rooted in our greater capacity for sympathy. We (most normally functioning humans) share with animals a propensity to grow comfortable with and fond of others as we interact more with them. But we are also able to empathize with others – to imagine what it is like to be them and to feel as they do, and to respond accordingly – to an extent that animals cannot.

194. Elliot Sober and David Sloan Wilson have published extensively arguing for group selection theory – the idea that groups of humans (or other social animals) with a higher ratio of altruists to egoists have an evolutionary advantage over groups with lower ratios. See, for instance, their excellent book *Unto Others: The Evolution and Psychology of Unselfish Behavior* (Cambridge: Harvard University Press, 2003). Charles Darwin himself suggested the idea of group selection in *The Descent of Man* (Seattle: Pacific Publishing Studio), 2011.

Midgley cautions us not to think that our emotional bonds with animals somehow ‘don’t count’ in our moral deliberations as they do in our relationships with other humans, simply because they are animals. We do not question whether we have strong moral responsibilities toward humans with whom we have such bonds. It is as clear as any ethical claim can be that we do. Therefore, we ought not to question whether we have strong moral responsibilities toward animals with whom we have such close bonds. We have them, and we ought to take them very seriously. Individuals of any species with whom we have them are a part of our moral community.

D. Val Plumwood’s Account of Dialogue with the Other

In her book *Environmental Culture: The Ecological Crisis of Reason*, Val Plumwood argues that a pervasive hegemonic human-centrism has distorted Western culture’s relationship with the nonhuman world. This human-centrism rests on a series of dualisms, or concept pairs whose referents are seen as different from one another, and which difference is thought to entail a categorical difference in value. Central among these dualisms is that between the rational and the nonrational. On this concept pair, the rational autonomous mind is highly valued and the non-rational material lacks agency and is little valued or not valued at all.¹⁹⁵ Humans are thought of as essentially rational autonomous minds, whereas animals are thought to be significantly or wholly lacking these characteristics. Therefore humans are highly valued for what they are, whereas animals are not.

195. See Plumwood, *Environmental Culture*, 108.

Once the judgment is made that humans are superior because they have certain characteristics that animals lack, further reasoning about whether animals might have some other characteristics make them valuable is abandoned. Capacities that animals have but that humans do not possess or only possess to a lesser degree are for this very reason seen as being of little or no value in their own right. The greater sense of hearing that many animals possess, for instance, cannot be valued or cannot be valued in anything like the way uniquely human capacities are valued.

Plumwood argues that Regan and Singer's moral reasoning, while appearing to grant animals the respect that is owed them, is full of hegemonic human-centric thinking. On their accounts, "a being either has a full-blown right to treatment considered equal to human treatment, or it is not to be subject to any form of ethical consideration at all."¹⁹⁶ Only a subset of animals – those that are sufficiently like humans – are granted respect as moral subjects. These are granted the status of *honorary humans*. On Singer's account, honorary humans include all sentient individuals. On Regan's account, honorary humans are all subjects-of-a-life. This kind of thinking is a problem because it does not acknowledge the value that beings have by virtue of their *difference* from human beings.

Hegemonic human-centric thinking dismisses moral consideration of the nonhuman (or the non-honorary human, as the case may be) as misguided because there is no need to morally consider what has no moral value. Or, at best, it sees moral consideration of the nonhuman as a waste of time because the animals' value is so much less than the human's. By refusing to encounter the other as a morally valuable being

196. Plumwood, *Environmental Culture*, 144.

whose good ought to be respected, hegemonic human-centrism excludes nonhumans from moral consideration.

In contrast to hegemonic human-centrism, Plumwood advocates a variety of *interspecies egalitarianism*.¹⁹⁷ Rather than beginning by classifying an individual as worthy of little or no moral consideration as hegemonic human-centrism does, we should begin by encountering the nonhuman as morally valuable. We should begin by seeking mutually respectful outcomes, that is, by seeking the good of both humans *and* nonhumans. It may be necessary to rank the value of individuals when a mutually respectful outcome is not possible. But we should only engage in such ranking as a last resort (Plumwood does not say how value ranking should proceed in the event that it is necessary).

According to Plumwood, it is plain that animals are intentional beings: “To stay alive and reproduce they (animals) have to – and to all but the most reduction-blinded observer patently do – think ahead, try to outsmart you, work out how to escape your reach, and fool you with successful attempts to distract your attention.”¹⁹⁸ Given animals’ intentionality, we ought to adopt a stance of openness to learning from them and to valuing their differences from us as well as their similarities to us. This requires “studying up” – that is, learning what is of value to the other, and interacting on that basis, rather than only on the basis of one’s own evaluations of the other. It involves

197. Plumwood’s interspecies egalitarianism does not entail the judgment that each form of life is equally valuable. It is not the same interspecies egalitarianism that I argue against in chapter 5, but rather, a kind of methodological interspecies egalitarianism.

198. Plumwood, *Environmental Culture*, 177. Word in parenthesis added. Plumwood adopts a controversial panpsychic metaphysics of mind on which all of nature, both animate and inanimate, has intentionality. I focus here on her less controversial account of the intentionality animals.

giving up on the idea that ‘real’ communication must involve uniquely human forms, such as the use of propositional language.

If animals are intentional, communicative beings that are morally valuable, then we have good reason to develop the communicative virtues in our interactions with them. We should be attentive, inviting the other into a relationship with us that consists in a process of mutual adjustment that is always open to further adjustment as knowledge of the other grows. We are to keep in mind that in spite of our best efforts not to misunderstand the other, we will sometimes miss what the other is communicating to us. Keeping this in mind keeps us cautious and humble in our interactions.

Throughout this process of encountering the other, it is helpful to observe what animals prefer when given the opportunity to choose. By observing what they prefer, insofar as we see them as intentional beings, we can learn much about how we ought to treat them. Plumwood gives an example from Marian Stamp Dawkins’ work with hens: When given the opportunity, laying hens chose “pecking opportunities, dustbaths, nestboxes, and choice about sociality – all things they are deprived of in intensive rationalist agriculture.”¹⁹⁹

A paradigmatic kind of dialogical relationship that acknowledges the intentionality of the other is that of the familiar – our relationship with companions, friends, or acquaintances. Familiar relationships characteristically do not depend on any “moral exclusion of other animals.”²⁰⁰ As Plumwood explains, “Relationships with local lizards, birds, and occasionally friendly mammals like wombats, are some examples of

199. Plumwood, *Environmental Culture*, 192.

200. Plumwood, *Environmental Culture*, 165.

familiar relationships.”²⁰¹ But we also have familiar relationships with domestic animals, most obviously household pets.

Dismantling hegemonic human-centrism also has important political implications. If we see nonhumans as having a value that must be respected regardless of their utility for humans, then we must consider what a just share of resources might look like *for them*. According to Plumwood, redistribution includes “assigning more land to earth others, whether in the form of areas exclusively for their use (as in some wilderness areas and national parks), prioritizing their welfare in many multiple use areas and requiring human behavior to adjust, and encouraging more non-human use of exclusively human areas like cities and suburbs...”²⁰² It also includes giving agricultural animals a greater share of resources than is required to produce meat and eggs for our dinner tables. It requires giving them the share of the resources that is necessary to ensure their well being.

E. Clare Palmer’s Causal Account

In her book *Animal Ethics in Context*, Clare Palmer argues that our causal relationships with animals ground a variety of obligations to assist them²⁰³, and that this way of understanding how obligations to assist are grounded helps to make sense of a widespread intuition that capacities theorists have had trouble explaining: the *laissez-faire*

201. Plumwood, *Environmental Culture*, 165.

202. Plumwood, *Environmental Culture*, 117.

203. Palmer is not the first author to argue for special duties to particular animals with whom we are causally related in the right ways. See Keith Burgess-Jackson, for instance, (“Doing Right By Our Animal Companions” in *The Journal of Ethics*, 2: 159 – 185, 1998). But hers is more developed and applies it to a wider range of animals and their relationships with us.

intuition. According to this intuitive judgment, we have a duty to care for/assist domestic animals, but lack such a duty or at least have no similarly strong duty to assist wild animals [‘living in the wild’]. For the sake of clarity and consistency, throughout her work, Palmer uses Clutton-Brock’s concept of ‘domesticated’ and ‘wild.’ On their conception, “wild” and “domesticated” are opposite ends of a spectrum, where “wild” means both constitutively and locationally wild, and “domesticated” means “intentionally controlled by humans with respect to breeding, in particular, by deliberate selective breeding.”²⁰⁴

Palmer begins her argument that we have special obligations to assist animals by defining what she means by ‘relation’: Having a relation *just is* “*having an effect, or having had an effect on another, or the existence of an interaction between one being and another, such that the effect or interaction makes a difference in states of affairs.*”²⁰⁵ We are more causally entangled in some individuals’ lives than we are in others. We are more causally responsible for what happens to these individuals. A pet owner, for instance, is more causally entangled in his or her pet’s life than in the lives of other persons’ pets, or other animals, for that matter. He or she limits the pet’s movements, provides a degree of social interaction that the pet would not otherwise have, and so on, thereby determining the conditions under which that pet lives its life. He or she does not similarly determine the conditions under which other animals live their lives.

204. See Juliet Clutton-Brock, *The Walking Larder: Patterns of Domestication, Pastoralism, and Predation* (London; Unwin Hyman), 1989, 66. Palmer calls animals that do not fall clearly toward one or another end of the continuum, or that fall in different places depending on their interactions with humans and with different humans – feral animals, ‘wild’ animals living in captivity, and household pests, for instance – animals living in the ‘contact zone.’ These animals can have commensal, contramensal, or mutualistic relationships with humans.

205. Palmer, *Animal Ethics*, 48.

Palmer argues that the causal responsibility we have over some of the animals in our lives grounds positive moral responsibilities toward them, i.e., obligations to assist. It is *because* I limit my pet's movements, feed my pet, and so forth, thereby determining the conditions under which my pet lives its life, that I have an obligation to care for my pet. And it is *because* others are not similarly causally responsible for my pet's well being that they do not have a similar obligation to care for my pet.

Palmer holds that humans are at least partly causally responsible for domesticated animal lives in three ways. First, we are causally responsible for their actual situation – for the opportunities they have to live their lives. Second, we are causally responsible for important parts of their natures, “including in many cases an inability to be self-sufficient.”²⁰⁶ Third, we are responsible for their very existence.

Because we have made domesticated animals particularly vulnerable in these ways, so that they cannot do well without our continual support, we have special obligations to assist them. The content of these obligations corresponds to the ways that they are dependent on us. If domesticated animals require frequent and ongoing social interactions with us in order to fare well, as is the case with dogs, for instance, then we must interact with them accordingly. If some other kind of domesticated animal does not require the same level of social interaction – a cow, for instance – then we need not supply such interactions. But in both cases, adequate space to move around, access to sufficient food and water supplies, medical attention, and so on, are clearly required.

In most cases, we have not made wild animals as vulnerable as we have made domesticated animals. Most wild animals at least retain the capacity to care for

206. Palmer, *Animal Ethics*, 91.

themselves and do not depend on us for their very existence. This, Palmer argues, explains the laissez-faire intuition: “Wild animals can be thought of as *distant* in morally relevant ways while, conversely, domesticated animals are relevantly morally *close*.”²⁰⁷ We are not, therefore, “required to assist fully wild animals. . . [whereas] we are required to assist domesticated animals (and additionally, some animals in the ‘contact zone’).”²⁰⁸

Nevertheless, Palmer argues that we have special obligations to wild animals insofar as we have been causally responsible for their increased vulnerability. We have obligations to assist wild animals in zoos, for instance, because we have made them vulnerable and dependent on us. They are externally dependent on us for their food, for opportunities to move around and to mate, and so on. And many of them are so accustomed to being cared for by people that they would not likely survive if humans were to stop caring for them. Moreover, wild animals can be harmed in ways that generate “reparation-like special obligations.”²⁰⁹ These are obligations to help individuals recover from some human-caused harm that has increased vulnerability, but does not presuppose continued vulnerability as in the case of domesticated animals that are internally dependent on us (see *Coyotes* below).

Not all of our special obligations to assist animals originate in our having made them vulnerable and dependent on us for their well-being. Palmer also argues that some of our special obligations to assist animals that we have made vulnerable and dependent originate in the benefits we derive from their vulnerable and dependent state and the

207. Palmer, *Animal Ethics*, 86.

208. Palmer, *Animal Ethics*, 86. Bracketed word added.

209. Palmer, *Animal Ethics*, 96.

beliefs we hold about them. First, “in accepting...the benefits of the institution of pet ownership, actively perpetuating it in one’s life, and not disassociating oneself from it or protesting against it...one acquires some share in moral responsibility for it – and for those individuals produced by it.”²¹⁰ Even if one does not own a pet, one can still have a weak moral responsibility to assist if one “personally benefits from being in a society with the institution of pet keeping”²¹¹ because one has *received* those benefits. If one enjoys the company of pets when visiting a friend, or has benefitted from the good that pets do in other peoples’ lives, for instance, one has a weak moral responsibility to assist pets. But if one actively protests against the institution of pet keeping, then for that very reason, one does not have any obligations to assist them.

Second, following an argument by Virginia Held,²¹² Palmer argues that if one holds beliefs about or harbors attitudes toward animals that devalue their lives, then even if one has not actually harmed them, one bears some of the responsibility for encouraging that harm, and therefore has a weak moral responsibility to assist them. These attitudes include “beliefs that animals do not or cannot feel pain, attitudes of indifference to animal pain, attitudes of deliberate ignorance about animal pain, attitudes that depend on human superiority and animal instrumentality, strong anthropocentrism, attitudes of enjoyment of animal pain, and so on.”²¹³ But if one has none of these attitudes, or if one has fought to discourage them or against the harms they have caused by taking part in political

210. Palmer, *Animal Ethics*, 111.

211. Palmer, *Animal Ethics*, 111.

212 See Held, Virginia. “Group Responsibility for Ethnic Conflict.” *Journal of Ethics*, 6, no. 2: 157 – 178.

213. Palmer, *Animal Ethics*, 114.

campaigns against factory farming, for instance, then one is not a member of this group and does not have the moral responsibility for the harms these beliefs have caused.

Hence, one does not have an obligation to assist on this basis.

In order to illustrate how the parts of her relational account work together, Palmer applies it various situations that are likely to arise or have arisen in our interactions with animals. I explicate three of them here: *Coyotes*, *Dumpster Kittens*, and *Polar Bears*. For the first two illustrations, I quote Palmer at length in order to capture all of the nuance and detail of the contexts involved, since these details are central to understanding Palmer's conclusions about what our moral responsibilities are in each case.²¹⁴

Coyotes:

A number of coyotes have been displaced from their habitat by a large residential housing development; they have lost access to much of their hunting territory and their denning areas have been destroyed. They cannot move elsewhere because other coyotes already occupy contiguous territory (and coyotes are territorial). The building of the housing estate has harmed the coyotes (setting back their serious experiential interests in ways that would not otherwise have occurred); they are now much worse off. They continue to suffer in the present from these past setbacks. And they are vulnerable to new, related hazards: road danger has intensified, and the new residents of the housing estate are trying to trap or shoot them. At no stage have any interests of the coyotes been taken into account.²¹⁵

Palmer argues that in this case, driving coyotes off their land and destroying their habitat creates backward-looking reparation-like special obligations to assist. It is easier to see in this case who the beneficiaries are (i.e., the homeowners) than it is to see who has harmed the coyotes, since many, including “the former owners of the land, the developers, the architects, and the construction workers...” were involved. Yet it is

214. Hence, the title of her book, *Animal Ethics in Context*.

215. Palmer, *Animal Ethics*, 102. It has been documented that coyotes replace wolves in more densely populated or urbanized human environments, thus expanding their range to new places in the wake of human development. The point Palmer is making might have been more strongly made by using a species for whom living side by side in human built environments is more of a challenge.

reasonable to think that each of these parties bears some responsibility. Assisting these coyotes, Palmer suggests, might involve restoring some of their habitat and learning to live with them – learning to relate to them as fellow inhabitants of the same residential ecosystem. But she emphasizes that it is better not to harm than to try to make up for having harmed after the fact. It would have been better for the developers and the homeowners to have enacted a plan to preserve some coyote habitat and to facilitate relations between the species before driving the coyotes off their land.

Dumpster Kittens:

Suppose the owner of a pedigree cat decides to breed from her. However, once born, the kittens turn out to have various breed imperfections and are unlikely to sell for a profit. So the breeder takes the week-old kittens and leaves them in a dumpster. Even if – had they been older – these kittens might have lived feral lives, they are too young right now to survive; left in the dumpster, they will die unless assisted. Out for an evening stroll, Peter passes the dumpster. Hearing noises, he looks in and sees the kittens. Should he assist them? Consider a variation on this case: Suppose instead Peter chances upon a nest of week-old urban *rats* in a dumpster, apparently abandoned by their mother and also too young to survive without assistance. Should he assist the baby rats? Are his responsibilities different in the two cases, and if so, why?²¹⁶

In the case of the kittens, the breeder is primarily responsible for their vulnerable state and the harm that is likely to follow, though the institution of breeding pedigree cats, the economic system, and so on, are also involved. Therefore, the breeder has the strongest responsibility to assist the kittens, although others who benefit from the institution of pet keeping, or those who do not value animals as they should, also have a weak obligation to assist. In contrast, urban brown rats are contramensals, having entered our homes without our consent, benefiting from living with us but giving us nothing in the way of benefit or even harming us in return. Therefore, we do not have an obligation

216. Palmer, *Animal Ethics*, 106.

to assist them. The brown rats are to be treated in like manner to wild-living constitutively wild animals – we have only negative duties not to harm them.

Polar Bears:

Polar bears are increasingly threatened by the early breakup of winter ice in the Arctic. Early breakup of winter ice makes it difficult for bears to hunt and to obtain enough calories to maintain a healthy weight through the summer. Over time this causes the bears to weaken, to become more susceptible to diseases, and to die. The untimely breakup of winter ice is directly attributable to increasing concentrations of carbon dioxide and other greenhouse gases in the earth's atmosphere. And the increasing concentrations of greenhouse gases are largely the result of human activities and changes in the way that carbon is cycled that have resulted from human activities. We are therefore causally responsible for having made polar bears vulnerable.

Because we are causally responsible for polar bear's increased vulnerability, we have a special obligation to assist them. The first thing that we should do is to assist them is to stop harming them by putting an end to carbon emissions. But Palmer thinks that it is unlikely that this will happen anytime soon. Moreover, even if emissions could be halted on a global level, because the carbon that has already been released will continue to negatively impact the climate for decades to come, polar bears will continue to be harmed by what we have already done for many years into the future. The best way to assist polar bears, Palmer suggests, given that they are wild animals whose close interactions with human civilization can be dangerous for both bear and human, is to protect them from direct threats and their remaining habitat from non-climate change related habitat destruction.

Finally, Palmer addresses the worry that domestication is morally problematic in its own right and therefore ought to be stopped or at least discouraged. She argues that there is nothing wrong with making animals more dependent on us, either through domestication or making animals externally dependent. Domesticated animals are not “psychologically harmed *merely by being in* relationships of vulnerability, as one might argue for the human case.”²¹⁷ Nor do domesticated animals “experience humiliation about their dependence, resentment about their subordination, nor future-oriented anxiety about the long-term consequences of their vulnerability.”²¹⁸ If we give them the special care and attention they need, their relatively high level of vulnerability is not morally problematic.

F. Conclusion

I have outlined two important capacities accounts of animal ethics, as well as three relational accounts. Tom Regan and Peter Singer argue that the capacities an individual actually has are a sufficient ground for our moral responsibilities, though they differ on which capacities serve as a ground: For Regan it is being a subject-of-a-life, while for Singer, it is the capacity to experience pleasure or to suffer pain. Mary Midgley, Val Plumwood, and Clare Palmer, on the other hand, argue that capacities approaches are insufficient to ground all of our moral responsibilities toward animals. Our moral responsibilities must also be grounded in our relationships – for Midgley, in our affective ties with others, for Plumwood, in our encounter with the other as an intentional being, and for Palmer, in our causal responsibility for the animal’s opportunities to live its life.

217. Palmer, *Animal Ethics*, 124.

218. Palmer, *Animal Ethics*, 124.

In the next chapter I will explicate and defend my own version of the capabilities approach as a superior framework within which to include animals as subjects of justice – superior to Nussbaum’s version, to social contract theory, and to Regan’s and Singer’s frameworks. I will draw extensively on the relational approaches that I have outlined in this chapter in developing my capabilities approach, particularly on Plumwood and Palmer’s work.

CHAPTER 6

THE CASE FOR MY CAPABILITIES APPROACH

ABSTRACT

In my project I argue that my version of the capabilities approach provides a better framework for including animals as subjects of justice in Western liberal societies than Martha Nussbaum's version of the approach, Tom Regan's animal rights, Peter Singer's animal welfare, or any social contract theory. I first lay out Nussbaum's capabilities approach. Then I examine several versions of the social contract, highlighting a number of reasons that animals cannot be included as subjects of justice on a social contract theory. After this I consider Regan's animal rights and Singer's animal welfare accounts, as well as Val Plumwood's egalitarian account of the intentional other, Mary Midgley's affective account, and Clare Palmer's causal history account of our responsibilities toward animals. Drawing on Plumwood's and Palmer's work, in the last section, I craft a version of the capabilities approach that departs radically from Nussbaum's version in two ways. First, on my approach, individuals are valuable by virtue of their form of life, rather than by virtue of the capacities they actually have. Second, following Palmer, I hold that our responsibilities toward them are partly determined by the ways in which we have made them vulnerable to harm, rather than only by the overriding moral directive to provide every individual the opportunity to flourish. I argue that these components of my account enable it to avoid critical problems that Nussbaum's account, Regan's animal rights, Singer's animal welfare, and social contract theories cannot.

In this chapter I develop my own version of the capabilities approach and argue that it does a better job of including animals as subjects of justice in Western liberal societies than Nussbaum's version, Regan's animal rights or Singer's animal welfare, or any kind of social contract theory. I begin by classifying animal ethics according to the stance they take toward animals at the start of moral deliberations [which reveals what they take to be ideal], and (2) the stance they take when the ideal cannot be achieved [which reveals the relative values that are at play] – methodological egalitarianism and inegalitarianism, and strict egalitarianism and inegalitarianism, respectively. I then argue that an adequate framework for including animals as subjects of justice must be methodologically egalitarian. After this I argue that this methodological egalitarianism ought to be coupled with a strict interspecies inegalitarianism that is grounded in a life-form hierarchy of value.

My adoption of a life-form hierarchy of value is one of two key ways in which my capabilities approach differs at its core from Nussbaum's version of the approach: Whereas individuals are valuable by virtue of the capacities they actually have on Nussbaum's account – the form of life tells us which capacities are central and how they ought to be supplied, not how valuable the individual is – on my version of the capabilities approach, individuals are valuable by virtue of their form of life. This departure is significant because it abandons the idea that harms are greater because they block more central capacities or block central capacities more. Harms are greater when they block the capabilities of individuals whose forms of life are more valuable. I will argue for this point in section C below.

Next, I argue that social contract theory cannot both include animals as direct subjects of justice *and* see some subjects of justice as being morally worth less than others because they have fewer capacities or their form of life is less valuable, as the case may be – what I call the *problem of morally relevant inequalities*. My capabilities approach, on the other hand, can do both.

I end by elucidating a second key way in which my capabilities approach differs at its core from Nussbaum's version of the approach. Drawing from Palmer's work, I argue that our responsibilities toward animals are partly determined by the ways in which we have made them vulnerable to harm, and not only by an overriding moral directive to provide every individual the opportunity to flourish, as Nussbaum thinks. The requirement that we provide every individual the opportunity to flourish is not only burdensome. It is impossible to fulfill. But it is not a necessary part of the capabilities approach. We can acknowledge that there is much of value in the world – in this case, flourishing – without also holding that it is our collective responsibility to secure all that is of value. We can hold instead that we are responsible for the things that *we* have done or are doing to get in the way of flourishing.

A. Two Kinds of Egalitarianism and Inegalitarianism

Animal ethicists generally agree that the individuals affected by one's actions should be considered at the start of moral deliberations – whether or not they are human. But they differ on how these deliberations should proceed and what should be done if conflicts between individuals' flourishing cannot be avoided. It is therefore helpful to classify animal ethics according to (1) the stance they take toward animals at the start of

moral deliberations [which reveals what they take to be ideal] and (2) the stance they take when the ideal cannot be achieved [which reveals the relative values that are at play]. I call the former distinction *methodological* and the latter *strict*.

Methodological egalitarianism is an ethical stance that begins by seeking not to harm any morally considerable individuals, and only considers whether some individuals are more valuable than others when harm cannot be avoided. That is to say, one is only justified in harming when one cannot proceed without causing at least some harm, either to oneself or to others. Therefore, judgments about the lesser value of morally considerable individuals, if they come into play at all, can only justify harming them when harmless outcomes are not possible.²¹⁹ And even then, the harm is regrettable in the sense that it would have been better if it were possible to act without causing harm. Importantly, harmless outcomes are often possible between individuals that are not equally morally valuable. Hence, methodological egalitarianism calls upon us to structure our relationships with nonhumans so as to minimize situations in which it is impossible to act without causing harm.

Methodologically egalitarian thinking is present in Nussbaum's and Regan's work, though they do not call it out as such. My own account is methodologically egalitarian, too, as will become clear shortly. Plumwood devotes a good deal of *Environmental Culture* to methodologically egalitarian thinking, calling it "a...plausible

219. Methodological egalitarianism is also common in the thinking of many pragmatists. Anthony Weston, for instance, in his short and commonsensical *A Practical Companion to Ethics*, discusses the need for "creative problem solving in ethics" – by which he means that we need to seek mutually beneficial outcomes and not get caught up on one side or the other of an apparent ethical conflict (3rd ed. New York: Oxford University Press, 2006), 31. See especially chapter 3.

way to interpret the concept of interspecies egalitarianism.”²²⁰ Whether as Plumwood calls it – a kind of interspecies egalitarianism – or as I call it, methodological egalitarianism – this way of thinking does not abstract away from context or get caught up in pernicious dualisms or in a swirl of deductive inferences when encountering the other. Rather, methodologically egalitarian thinking encounters others as intentional beings and seeks to respect the unfolding of their various kinds of flourishing in that context. This way of understanding what is going on in our moral deliberations and interactions with others focuses on our relationships with them, highlighting the way in which these relationships are partly constitutive of our own flourishing.

Methodological egalitarians aim at creating a society in which moral conflicts between humans and nonhumans are less common by structuring our relationships with each other in ways that minimize harm. They see work in this direction as a pressing matter of justice. Methodological egalitarians’ reasons for affirming methodological egalitarianism are not monolithic: They vary according to their respective theoretical commitments.

Methodological inequality is an ethical stance that begins by considering whether some of the individuals involved are more valuable than others and therefore of greater or only concern. The thinking behind methodological inequality is this: Harm is sometimes justified even when moral conflicts can be resolved without harming any of the individuals involved. Depending on the account, harm can be justified by the

220. I have chosen to call what Plumwood sees as a kind of ‘interspecies egalitarianism’ ‘methodological egalitarianism’ in order to distinguish it from the stricter kind of interspecies egalitarianism that Rowlands endorses and that I will describe later in this section – what I call ‘strict egalitarianism.’ See *Environmental Culture*, page 174, for Plumwood’s complete quote: “Non-ranking is a much more plausible way to interpret the concept of interspecies egalitarianism than ranking as equal in a scale of moral worth.” In this sentence, Plumwood is noting the distinction between methodological and strict egalitarianism that I highlight in my classification system.

fact that the individuals harmed are less valuable or have fewer or less pressing interests or preferences not to be harmed. It can also be justified by appealing in various ways to a greater good that does not reduce to the good of the individuals affected by one's actions.

Methodological inequality is the dominant way of thinking about interspecies ethics among Western philosophers who are not working in the area of animal ethics. Rawls' justice as fairness is a good example of a methodologically inequality account: He excludes animals from consideration as direct subjects of justice because they lack a sufficient capacity for practical reason. Their needs do not *need* to be considered at all. However, utilitarians whose accounts require that we maximize the utility of our actions – primarily act utilitarians – are also methodological inequality.

On Singer's account, for instance, judgments about which individual's interests are more or less important come in right from the start. Harm is justified when it brings about a net increase in the satisfaction of interests even when one could proceed without causing harm. But methodological equality holds that harm is not justified unless it cannot be avoided. A society ordered according to Singer's ethics would not have institutions and practices that are a net drain on interest satisfaction, but it *would* encourage moral conflicts that generate net increases in interest satisfaction.

Strict equality holds that no moral subject or subject of justice is more valuable than any other, and therefore, that the idea that some individuals are more valuable than others ought never to play a role in deciding how to act. For this reason, strict equality entails methodological equality and is incompatible with any

form of inequality. Of the authors whose accounts I have examined in my project, only Rowlands is a strict egalitarian.²²¹

Strict inequality is an ethical stance that holds that some moral subjects or subjects of justice are more valuable than others and that this ought to play a role in deciding how to act in at least some situations. By definition, strict inequality is incompatible with strict egalitarianism. But since methodological egalitarianism holds that one is only justified in harming when one cannot proceed without causing at least some harm, either to oneself or others, an account that permits or recommends harm to some individual(s) *only when harm cannot be avoided*, is compatible with methodologically egalitarian thinking. Some strictly inequality accounts only bring judgments of relative value to bear when moral conflicts cannot be resolved without causing harm. These accounts are both methodologically egalitarian and strictly inequality.

B. The Case for Methodological Egalitarianism and Its Implications

In this section I argue that just treatment of animals is methodologically egalitarian treatment, and therefore, that frameworks for including animals as subjects of justice ought to be, as my capabilities approach is, methodologically egalitarian. I further argue that a society structured according to methodological egalitarian thinking will not permit industrial animal agriculture or harmful animal research, though it will permit some kinds of hunting.

221. Strict egalitarian views are uncommon in the animal ethics literature. Even biocentrists who posit some type of equality across species lines usually qualify this in ways that grant privilege to some individuals over others – notable among these, humans or some subset of humans.

If individuals have a good of their own, they are direct subjects of justice. Animals have a good of their own that consists in their flourishing. They are therefore direct subjects of justice. Direct subjects of justice must be treated as ends. Therefore, nonhumans must be treated as ends. At minimum treating individuals as ends involves considering their needs and interests in deciding how to relate to them so as not to impede their flourishing. That is, it requires relating to them in ways that do not involve harming them and only considering harming them when harm is unavoidable. Therefore, a society whose institutions, public policies, and laws are methodologically egalitarian is a just society, and a society whose institutions, public policies, and laws are not is an unjust one.

Human beings are *moral beings*, that is, we organize our lives according to our judgments about good and bad, right and wrong. This is the activity of practical reason. For Nussbaum, practical reason evaluates and makes moral judgments, but we do not evaluate practical reason according to whether it evaluates rightly. We evaluate it according to whether it enables evaluation and living according to one's own conception of the good. Hence, on Nussbaum's account, practical reason is functioning just fine whether one's conception of the good is methodologically egalitarian or inegalitarian.

I argue, however, that this way of evaluating practical reason is incomplete. If human beings are to live in a society that is just not only for humans but also for nonhuman individuals, then we must also evaluate practical reason according to whether it is functioning in a way that helps to create such a society. Or, to put it another way, we must consider whether methodologically inegalitarian thinking in one's own comprehensive conception of the good, if it is prevalent among the members in a society,

is compatible with a political conception of the good that is methodologically egalitarian. When we evaluate the functioning of practical reason in this way, we see that although individual human beings may flourish without living in and through methodologically egalitarian conceptions of the good, methodologically inegalitarian thinking generally gets in the way of creating and sustaining a justly ordered society.

There is a positive correlation between desiring the good of others and acting in ways that are consistent with their good, assuming that one is diligent in seeking to understand how others flourish. The correlation between only desiring one's own good and acting in ways that are consistent with others' good, while it is sometimes present, is weaker, since it remains contingent on one's benefiting from acting in ways that do not get in the way of others' flourishing, and there will be many times in which it is simply more advantageous to oneself to get in the way. Moreover, methodologically egalitarian conceptions of the good do not simply see one's own or others' flourishing as good. Rather, they see flourishing *as such* as good, whether in oneself or in others, and see others' flourishing as being partly constitutive of one's own flourishing.²²² Practical reason that is functioning in this way builds relational bonds within and across species boundaries and discourages desires and motivations that encourage harmful behaviors.

It follows that a society ordered according to methodological egalitarian thinking and whose citizens are encouraged to think in and through methodologically egalitarian conceptions of the good will be a society in which relations between individuals are more

222. This is what it means to say that affiliation and practical reason are architectonic capabilities on my version of the capabilities approach. It is also in very general terms close to the idea of the social self that Chris J. Cuomo describes in her book *Feminism and Ecological Communities: An Ethic of Flourishing*, although I am here approaching it from within a capabilities framework. Cuomo quotes Marilyn Friedman approvingly and then paraphrases, "Given that selves are social, self-interestedness is not necessarily egoistic" (Routledge: New York, 1998), 98.

reliably respectful of a variety of kinds of flourishing. Any account of justice for nonhuman animals ought therefore to be methodologically egalitarian, and social institutions and policies ought to be set up so as to encourage methodologically egalitarian thinking and discourage methodologically inegalitarian thinking.

For political purposes, and in Western liberal societies, interacting respectfully requires guaranteeing the opportunity to flourish rather than flourishing. In these societies governments must allow their adult citizens the freedom to exercise their practical reason up to the threshold level or not. But given that justice requires methodologically egalitarian institutions, this freedom must be limited: Laws must limit the degree and the ways in which individuals are able to express their desire to harm others. Moreover, government and social institutions in these societies must be structured so as to provide the opportunity for healthy exercise of practical reason, whatever adult citizens choose to do.

Creating a society that protects the opportunity to flourish begins with the right kind of education. Educators must cultivate sensitivity to the good of both human and nonhuman others, since one cannot consider others' good if one has not learned to see others as morally considerable.²²³ It also requires a serious overhaul of existing institutions and dismantling or radically restructuring others. The two institutions that are most in need of dismantling or radical restructuring in Western liberal societies if animals

223. For sentient beings – for the paradigmatic subjects of justice in Western liberal societies – this sensitivity will involve what Lori Gruen calls entangled empathy (See her insightful short work *Entangled Empathy: An Alternative Ethic for our Relationships with Animals* NY: Lantern Books, 2015). Entangled empathy is “a type of caring perception focused on attending to another’s experience of wellbeing. An experiential process involving a blend of emotion and cognition in which we recognize we are in relationships with others and are called upon to be responsive and responsible in these relationships by attending to another’s needs, interests, desires, vulnerabilities, hopes, and sensitivities” (3).

are to be treated justly are industrial animal agriculture and harmful animal experimentation.

Institutions involved in the production, processing, distribution, and sale of animals for meat or hides, or any other product, to the extent that these practices needlessly impede animal flourishing, are unjust. According to methodological egalitarian thinking, one should only consider harming others if it is impossible to relate to them without harming them or harming oneself. Most practitioners of animal agriculture in Western industrialized societies do not see animals as having a dignity of their own that demands moral consideration, but rather, as objects fit only for human use. This objectification of animal lives obscures the communicative, intentional nature of animals, and this, in turn, enables their efficient, systematic and guilt-free exploitation. Any practice of animal agriculture that has this kind of thinking at its base, regardless of scale, must be dismantled.

Similarly, institutions that conduct harmful experiments on animals, to the extent that these experiments needlessly impede animal flourishing, are unjust. Proponents of harmful animal experimentation begin by setting up a false conflict between the flourishing of human and nonhuman individuals: They claim that we must choose between the well being of human individuals who might be benefitted by the experiments and that of the nonhumans who will be harmed by them. But in methodologically egalitarian thinking, this is usually not a genuine moral conflict. According to methodological egalitarianism, when the question of whether to set up a harmful experiment arises, judgments about the magnitude of the harms or benefits in question, or

about the relative worth of the individuals affected, should not even come into play, since these are only relevant *when it is impossible not to harm*.

Harmful experiments sometimes benefit some individuals, though usually they do not. But whether or not they benefit some individuals, these experiments are physically or psychologically harmful to the animals that are subject to them *and* harmful to the human experimenters in that conducting them requires methodologically integralitarian thought and action. When forced to choose between doing what *may* bring about some good but we *know* will bring about harm to all of the parties involved, and doing what we *know* will not harm any of the parties involved, we ought not to do what we *know* will cause harm. That is, we ought not to perform the harmful experiments.

Before continuing, I want to register a serious objection to this line of reasoning. One could argue that abandoning harmful research *harms* the individuals that would be benefited by the research. This objection is grounded in the idea that the distinction between causing harm by *doing* and by *not doing* is not, after all, a morally relevant one. There is much truth in this objection. We have positive responsibilities to care for others in a variety of ways, some of which are connected to the causal history of our relationships with them (see section F of this chapter). Certainly, when care can be rendered – or experiments conducted, as the case may be – without causing harm, we may do so, and in some cases have a responsibility to do so. It seems reasonable to think that not caring in such cases is indeed a kind of harm.

However, things are not so clear when we consider *doing* things that harm some individuals in order to benefit others. If an individual is suffering from an incurable ailment and I do not conduct any painful experiments in search of a cure, I am not ailing

him or her – the ailment is. There remains a sense in which not conducting the experiment harms the ailing individual. But this does not give anything like the clear warrant for helping that it would if the experiments required weren't harmful. At any rate, there is room for plausible disagreement as to how such situations should be understood ethically. On my account, we do not have a responsibility to harm some morally considerable individuals in order to help others who are not being harmed by moral agents, when one can act without causing harm to any of the parties involved.

Although hunting is not as central an institution in Western liberal countries as industrial animal agriculture and harmful experimentation, it nicely illustrates the morally relevant difference between methodological egalitarianism and methodological inegalitarianism. So I pause to consider it here.

Hunting is permissible whenever fully respectful relations between would-be human hunters and their would-be animal prey are not possible. In keeping with methodological egalitarianism, I hold that hunting that is conducted with full acknowledgment of the hunted's value and only out of necessity is permissible, whereas hunting that does not acknowledge the hunted's value or is not done out of necessity is not. Hence, members of human societies that see nonhumans as deserving of respect – indigenous peoples like the Inuit, for instance – are not doing anything wrong when they kill and eat animals or use their skins in order to meet basic needs that cannot be adequately met in other ways.

One might object that indigenous hunters' admiration for predators is often rooted in their admiration for predators' hunting skills, and it seems odd to say that hunting that is grounded in this way is respectful toward the hunted individual. In response to this

objection, I point out that the capabilities approach I have developed does not see nonhuman predators as doing something wrong when they hunt prey. Nor does it hold that human predators are doing something wrong when they hunt and kill animals in order to meet those needs that are essential for their flourishing. The objection therefore has no force. Indigenous hunters are not doing anything wrong when they admire predators for their predatory skills and seek to imitate them, insofar as these skills are exercised at the proper time – out of necessity – and in the proper way – out of respect or reverence and gratitude for the necessities of life supplied by the prey. It is always *causing unnecessary harm* that is the problem.

Recreational hunters, on the other hand, who see the animals they hunt as being valuable only as objects for the ‘sport’ they provide – to use just as thoughtlessly as one uses a basketball or a baseball – are doing something wrong when they hunt. The harmless outcome – not hunting – does not cross the recreational hunter’s mind, since the human hunter’s desires to entertain himself or to hone his craft, and so on, are all that matter. The first kind of hunting is therefore permissible, whereas the latter must be ended.²²⁴

C. The Case for a Life-Form Hierarchy of Value

I have argued for methodological egalitarianism, and that methodological egalitarianism permits humans to harm other animals when this harming cannot be

224. With this argument I reject universal moral vegetarianism. Although I do not engage in the kind of examination of the conceptual and social bases of oppression that ecological feminists do, we agree on this conclusion. And we agree for very similar reasons – reasons rooted in respectful interaction with nonhumans and in the goodness of their flourishing. See, for instance, Karen J. Warren’s critique of moral universal vegetarianism: “Must Everyone Be Vegetarian?” in *Ecofeminist Philosophy: A Western Perspective on What it is and Why it Matters*. Rowan & Littlefield Publishers, Inc.: Lanham, MD, 2000, 125 – 145.

avoided. But it also allows humans to harm other humans when this is necessary for animals to flourish, regardless of the capacities they have. This latter conclusion conflicts with the most common considered judgments in Western liberal societies about the greater value of human individuals or some subset of humans, i.e., it conflicts with the human not-meriting intuition.

In order to resolve the conflict between unqualified methodological egalitarianism and the human not-meriting intuition, I argue for a kind of strict inequality that kicks in when harm cannot be avoided between humans and animals. Specifically, I argue that the right kind of life-form hierarchy of value provides a better basis for this strict inequality than do actual-capacities hierarchies of value. I further argue that by adopting this kind of life-form hierarchy of value within a broader methodologically egalitarian framework, my capabilities approach can explain why the human not-meriting intuition is not speciesist.

There are two non-arbitrary ways to answer the question of what makes some individuals more valuable than others within a Western liberal framework of justice: Either they are more valuable because they have more valuable capacities or some set of capacities that is more highly valued, or they are more valuable because their form of life is more valuable. Each of these ways of answering the question presupposes a kind of value hierarchy. *Actual-capacities hierarchies of value* judge that some individuals are more valuable because they have more valuable capacities, whereas *life-form hierarchies of value* judge that some individuals are more valuable because their form of life is more valuable.

Actual-capacities hierarchies of value match our considered judgments on whether death is a greater harm for normal adult humans than it is for other animals, though there is considerable variation among actual-capacities accounts on the question of how we should understand the value of individuals with different capacities. Some see animals as existing solely for human purposes and hold that our responsibilities toward them, insofar as there are any, are completely derivative from our responsibilities to our fellow humans. Kant's amphiboly provides a good example of this: Only normal adult humans have the kind of rational capacity that makes them directly morally considerable. Although we ought not treat animals poorly, since this disposes us to treat humans poorly, we are not doing anything wrong when we kill animals for the most trivial of reasons. Excepting Rowlands and Smith, all of the social contract theorists I have considered likewise dismiss animals from consideration as subjects of justice because they lack the requisite capacities.

Other actual-capacities theorists see animals as having a value all of their own that ought to be considered in our moral deliberations, though normal adult human lives are, in the final estimation, worth more. Regan, for instance, argues that although a human (presumably a normal adult human) and a normal adult dog are equally inherently valuable, the former's life is more intrinsically valuable by virtue of the more valuable quality of his or her experience. Similarly, Singer argues that normal adult humans' lives are more valuable because they have a highly developed capacity to plan for the future that other kinds of animals do not have or have only to a lesser extent. And Nussbaum argues that death is a greater harm for more complexly sentient individuals than it is for

less complexly sentient ones because it cuts off more of what is valuable: complex central capabilities.

Like actual-capacities hierarchies of value, life-form hierarchies of value match our considered judgments on whether death is a greater harm for normal adult humans than it is for other animals. Also like actual-capacities views, life-form hierarchical accounts give various answers to the question of how we should understand the value of different forms of life. An Aristotelian-style value hierarchy, for instance, sees animals as existing solely for the use of metaphysically superior humans, metaphysically lower animals for the sake of metaphysically higher animals, and metaphysically lower plants for the sake of everything higher than them on the hierarchy, and so on. Such a hierarchy denies the direct moral status of individuals lower on the hierarchy, thereby sanctioning their exploitation by those higher up.

The life-form hierarchy of value that I advocate, in contrast to the Aristotelian-style hierarchy of value, sees each individual as a dignified being worthy of moral consideration, whatever the individual's form of life. When a harmful outcome between a human being and another animal cannot be avoided, one ought to harm the animal rather than the human being on my account. But one should only ever harm an individual of a less complexly sentient species if harm is unavoidable, and even then, one must do as little harm as is necessary and be mindful that it is *still harm*. That is, in doing the right thing, there is still a loss of something good, a loss that is not denied or hidden but fully acknowledged *as loss*.

But whereas both actual-capacities and life-form hierarchies of value match our considered judgments about whether death is a greater harm for normal adult humans

than it is for other animals, only life-form hierarchies of value can match our judgments about the value of seriously cognitively impaired humans and young children. The same reasoning by which advocates of actual-capacities hierarchies of value judge normal adult humans more valuable than individuals of other species also yields the less palatable conclusion that normal adult humans are more valuable than humans with severe cognitive impairments. Just as nonhumans have less of what is of value – i.e., the relevant capacities – and are therefore morally worth less – so, too, humans with severe cognitive impairments are worth less because they have fewer of these capacities or have them to a significantly diminished degree.

But this cannot be right. For most of human history individuals with severe cognitive impairments have been treated as second-class members of human communities or even excluded from them. It is a great step forward that theorists like Nussbaum have recognized the injustice in this history and have seen the need to include them as direct subjects of justice with a fully human dignity. Nussbaum insists that severely cognitively impaired persons are just as valuable as normal adult human beings. But she also embraces an actual-capacities hierarchy of value that entails the judgment that severely cognitively impaired persons are worth less. These two judgments are contradictory. She must endorse one and reject the other.

Reasoning that humans with fewer capacities are worth less also introduces new justifications for treating young children poorly. If, for instance, it is not possible to avoid harming either a small child or his or her parent(s), the parent(s) would be justified in harming the child in order to secure their own flourishing. But this, it seems, is the opposite of how parent(s) should reason about their own interests in relation to their

children's. The parental relationship should be one of sacrifice for the good of the child when such conflicts arise.

At least a part of our judgment about the parents' particular responsibility to care for the child stems from the nature of the parent-child relationship. One could plausibly argue that this relationship necessarily involves an increased responsibility on the part of the parent(s) to care for the child in spite of the child's lesser moral worth. Yet if we take the parental relationship out of the question, so that the conflict is between a normal adult human and a small, unfamiliar child, while it is not as obvious that we ought to resolve the conflict in favor of the child, neither is it obvious that we ought to resolve it in favor of the normal adult. The two seem to be more or less of equal moral worth. This suggests that the greater responsibility of the parent(s) to care for the child does not offset the child's lesser value, but that the child is just as morally valuable as a normal adult human. Actual-capacities views, all by themselves, cannot explain any of these moral judgments.

Like actual-capacities views, some life-form hierarchical accounts of value entail the idea that severely cognitively impaired humans and young children are morally worth less than normally functioning adults. The Aristotelian-style value hierarchy I described above is one of them. Such life-form hierarchical thinkers judge that subsets of human individuals – severely cognitively impaired individuals, for instance – owing to their disability, are lesser kinds of humans and that they are therefore worth less than normally functioning adult humans.

But the life-form hierarchy of value that I advocate does not see some humans as being morally worth less than others. On the contrary, it sees every human as equally morally valuable however exceptional or degraded the individual's capacities may be. An

individual's capacities may be so irreversibly degraded that his or her life is not worth living, but this does not mean that the individual's life is worth less, only that living itself has in some sense become a harm worse than death for that individual. In every case, normal adult humans, young humans, and humans with severe cognitive impairments each receive equal priority in questions of justice.

I stress that although humans are equally morally valuable and are the most valuable individuals on my life-form hierarchy of value, they are not uniquely morally considerable. The reasoning I have outlined applies to all forms of life, not just to *Homo sapiens*: However exceptional or degraded their actual capacities are, each and every elephant is equally morally valuable, as is each and every gazelle, and so on and so forth.

I want to pause for a moment here to address an important concern. I have already argued that severely cognitively impaired humans and small children are just as morally valuable as normal adult humans. I have also suggested that some individuals' lives may be so filled with suffering and degraded capability that death may be less of a harm to them than continued life. But I have not said anything about humans earlier on in their life cycle – i.e., before birth. Perhaps it is reasonable to think that a fetus of, say, two months, is sufficiently unlike a small child so that it does not have a human form of life. It may be that aborting this fetus is not as great a harm as killing a small child. If so, then perhaps abortions are permissible or even ought to be performed in many cases, not only when a normal adult humans' life is in danger.

I do not take a stand on these questions here, though it is important that I work through them going forward.²²⁵ For now, I emphasize that *sentient* individuals – those

225. Nussbaum similarly set these questions aside (for the most part) in her major works on her capabilities approach. She only recently, for instance, published on the question of what her capabilities

whose lives can go well or ill *for* them – are the paradigmatic subjects of justice as far as my approach is concerned. If I have made a persuasive case that all sentient human beings ought to take moral priority over other sentient individuals, then I have already accomplished something important. And if I manage to develop a framework for seeing animals – paradigmatically, sentient individuals – as direct subjects of justice in Western liberal societies – then I will have done much.

Returning to my main line of argument, advocates of actual-capacities hierarchies of value also have trouble explaining the human not-meriting intuition. They often claim that it cannot be given any grounding explanation because there is none to give. It is, they say, an irrational bias that has become embedded in people's thinking for historical, cultural, and sociological reasons. In line with this view, advocates of actual-capacities hierarchies like Singer commonly generalize from historical examples of life-form hierarchies of value that undervalue animals to claim that life-form hierarchies are by their very nature oppressive and therefore do not warrant serious consideration.

But there are obvious counterexamples to this characterization. The kind of life-form hierarchy that I advocate is a case in point. There is nothing in such a view to suggest that it will encourage the continued oppression of animals. Moreover, as should already be clear, one needn't look far to see that many ethicists have grounded oppressive treatment of animals squarely in the capacities they actually have. Most of the social contract theorists I have considered in my project are a case in point. There is nothing about actual-capacities hierarchies of value *as such* to suggest that they provide a superior framework for seeing animals as subjects of justice.

approach has to say about the morality and legality of abortion. See Dixon, Rosalind and Martha Nussbaum. "Abortion, Dignity, and a Capabilities Approach," In *Public Law and Legal Theory Working Paper Series*, Paper No. 345 (March 2011): 1 – 19.

In contrast to the way that advocates of actual-capacities hierarchies have dealt with the question of how to explain the human not-meriting intuition, my life-form hierarchy explains the intuition in a way that firmly and directly connects it with our moral judgments: Human individuals ought to take moral priority in our moral judgments because their form of life is more valuable. And if human beings really are worth more by virtue of their form of life, then the bias in favor of humans is not morally arbitrary. Rather, it is justified by one's form of life. The charge of speciesism therefore fails.

Moreover, it should be clear by now that my version of the life-form hierarchy of value does not value humans more 'just because they are human,' insofar as what is meant by this is 'biologically human.' It instead grounds the greater value of the human individual in the species' form of life. I have been using the terms 'form of life' and 'species' synonymously as an evaluative concept, not a descriptive one.

Finally, capacities theorists often note that unlike life-form frameworks of value, their evaluative frameworks do not value humans more than other animals. This claim is true, so far as it goes, in that these accounts do not judge humans to be more valuable than other kinds of animals with similar capacities. But there is another way to look at the kind of equality actual-capacities hierarchies supply that is not nearly as favorable: Both actual-capacities accounts and my life-form hierarchy hold that the maximally valuable set of individuals consists exclusively of human beings. But actual-capacities are actually *more exclusive* in that they pick out a maximally valuable set of individuals that is smaller than the set of individuals picked out by my life-form hierarchy of value: a subset of human beings that has the required capacities.

From the forgoing arguments I conclude that an individual's form of life, when understood on my version of the life-form hierarchy of value, and within the broader framework of methodological egalitarianism, provides a better basis for judgments about relative moral worth than do the capacities an individual actually has.

Before moving on to the next section, I want to explain how my life-form hierarchy of value differs from another animal ethicists' account of the value of animal lives that at first blush appears rather similar to mine: Gary Varner's Schopenhauerian hierarchy of value. Varner builds his hierarchy of value with individuals whose interests are merely biological – plants, for instance – at the bottom, those whose interests include the satisfaction of desires higher up, and individuals whose interests are centrally organized and give meaning to their lives – what, following Bernard Williams, he calls *ground projects* – at the top.²²⁶ His notion of a form of life, like mine, is evaluative. And his account is methodologically egalitarian in that he holds as I do that we ought to seek to avoid harm whenever possible, but when this is not possible, we ought to do as little harm as possible. Varner frames this in terms of what he calls the *principle of least necessary harm*: “Other things being equal, it is better to satisfy ground projects that require, as a condition of their satisfaction, the dooming of fewer interests of others.” Typically, human beings have ground projects, whereas other kinds of beings do not.²²⁷

226. Varner, Gary E., *In Nature's Interests?: Interests, Animal Rights, and Environmental Ethics*, Oxford: Oxford University Press, 1998. See chapter 4 for a discussion of Varner's value hierarchy of interests.

227. G. E. Varner, “The Schopenhauerian Challenge to Environmental Ethics, in *Environmental Ethics*, Vol. 7, No. 3 (Fall 1985): 209 – 229, 228. Also, we both hold that “the irresolvability of some moral conflicts...is the undeniable *reality of value for each and every individual...*” Varner develops his account of moral value in a way that is inclusive of both biological parts and wholes, such as species and ecosystems, in much the same way that I am developing my account. I focus here, however, on the application of his account to individual biological organisms as moral subjects.

But although Varner's account *appears* to include a life-form hierarchy of value, it is at its base an actual-capacities hierarchical account. Varner grounds the moral worth of an individual not in the individual's form of life, but in the individual's capacity to have certain kinds of interests. Indeed, he emphasizes that his principle of least necessary harm is not speciesist because "it is ...a matter of contingent fact that some human beings have no ground projects (most obviously the irreversibly comatose but also some extremely mentally retarded or brain-injured individuals)."²²⁸ If anything, Varner's account of the moral worth of individuals is closer to Nussbaum's than it is to mine in that he, like Nussbaum, draws on the idea of a form of life but does not ground moral worth in an individual's form of life.

D. The Problem of Morally Relevant Inequalities

In chapters 3 and 4 of my project, I looked at the ways in which social contract theory excludes animals from direct consideration as subjects of justice and some social contract theorists' arguments that it can include them, after all. I now bring my own version of the capabilities approach up against social contract theory. I argue that while my capabilities approach can both include all individuals who are direct subjects of justice as direct subjects of justice *and* give moral priority to some direct subjects of justice over others, no social contract theory can do both. I further argue that this is a serious problem for social contract theory.

Social contract theorists ground individuals' dignity as ends in themselves in some kind of moral equality – an equality of moral or rational capacity, for instance. They model whatever kind of moral equality they choose into a hypothetical contracting

228. Varner, *In Nature's Interests...*, 93

situation. Contractors in this situation agree to order society in accordance with whatever kind of moral quality the social contract theorist has chosen, thereby ensuring just treatment of each individual as a direct subject of justice. This works well as long as all of the subjects of justice are equally morally valuable. But not every subject of justice is equally morally valuable. Given that not every subject of justice is equally morally valuable, social contract theorists face what I call the *problem of morally relevant inequalities*.

The dilemma is this: On pains of inconsistency, social contract theorists must either (A) accept some combination of methodological and strict interspecies inegalitarianism that excludes some direct subjects of justice from consideration as such (as Rawls', Carruthers', Gauthier's, Scanlon's, Hobbes', Locke's, and Cohen's accounts do), in which case their theories may prescribe just treatment for the direct subjects of justice they include, but do not do so for the direct subjects that they exclude, or (B) accept a methodological and strict interspecies egalitarianism that includes all direct subjects of justice as moral equals (as Rowlands does), in which case their theories cannot prescribe just treatment for all, since not all direct subjects of justice are equally morally valuable. Social contract theories that affirm the first horn of this moral dilemma are *radically incomplete* because they exclude many direct subjects of justice from the start, whereas social contract theories that affirm the second are *overly egalitarian* because they over or undervalue many direct subjects of justice.

An illustration of this dilemma will help to clarify. I have already argued extensively against wrongly exclusionary accounts (A) over the course of my project,

adding my voice to Nussbaum's and a chorus of other animal ethicists. So I will focus on accounts that are overly egalitarian in my illustration.

Suppose that moral equality can, as Rowlands argues, be modeled on Rawls' account so that it includes both humans and animals as direct and equally valuable subjects of justice. Suppose also that in order to ensure impartiality between humans and other animals – that is, in order to model moral equality – knowledge of the species to which one belongs is unavailable behind the veil of ignorance. Under these circumstances, it is reasonable to suppose that one might end up a rabbit or some other form of life that is less complexly sentient than *Homo sapiens* when the veil is lifted. Further suppose that for this reason, the contractors choose to grant other species equal moral standing with humans.

To see the problem with granting equal standing across species boundaries, consider what happens if we apply principles of justice chosen behind this strictly egalitarian veil to a society in crisis. Suppose that the people of this society are suffering from a widespread famine and homelessness as the result of some great calamity and that many animals living within its political boundaries are likewise starving or unable to find shelter in their habitats for the very same reason. Finally, suppose that this society has enough resources to feed and clothe *some* of the starving and homeless, but not all of them, so that a large number of direct subjects of justice cannot be helped.

Given strict interspecies egalitarianism, if those charged with distributing resources choose to supply the needs of other animals rather than humans, they will be acting justly – as justly as if they had chosen to help the humans rather than the other animals. An argument might even be made that because it takes more resources to

adequately shelter and care for humans than it does animals, a wise use of resources would be to distribute them among the other animals instead of the humans.

But if human beings – all humans, normal adult humans or sentient humans, or any substantial subset of humans, for that matter – really are more morally valuable than other animals, as I have argued that they are – then this result is unjust. The starving, homeless humans should take precedence in the distribution of aid to satisfy basic needs when one is forced to choose between them and nonhuman individuals. I conclude that because social contract theory cannot model morally relevant inequalities, it cannot include animals as direct subjects of justice without also permitting the unjust treatment of at least some human individuals some of the time.

E. Regan's and Singer's Failure to Explain the Laissez-faire Intuition

For the remainder of this chapter, I will be examining the laissez-faire intuition – the intuitive judgment that although we have moral responsibilities to care for domesticated animals, we do not have or we do not have similarly strong responsibilities to care for wild animals living in the wild or that we ought to 'leave them be.' In this section, I will take a look at the ways in which Regan, Singer, and Nussbaum have explained the intuition. And in the final section, I will argue that Palmer explains it better than they do and incorporate her explanation into my capabilities framework. I will further argue incorporating her explanation into my capabilities framework strengthens it in important ways.

Regan and Singer argue in favor of leaving wild animals living in the wild alone, and therefore, in support of the validity of the laissez-faire intuition. In what follows,

however, I argue that their theoretical commitments instead support the conclusion that we ought to engage in widespread intervention in nature. I likewise argue that in spite of Nussbaum's insistence that we not engage in the wholesale re-making of nature, her arguments that nature should be made just necessarily support a policy of increasingly large-scale intervention.

Regan argues that we ought to leave 'wild' animals be because they are competent at survival, whereas human children are not. He does not explain, however, what he means by 'competent.' He could mean 'highly capable of surviving' without human aid. Because young nonhumans routinely survive without our help, they do not need our help. The problem with this understanding of competence is that individuals of many species do not possess it. Many species of experiencing subjects of life have rather low survival rates. So if this is the understanding of competence that Regan has in mind, we are required to assist young nonhumans, just as we are human children.

Alternatively, perhaps the competence at survival that Regan has in mind is a minimal capacity to survive – that is, the animal is so constituted that it will *not necessarily* die without our help. But this is very far from the ideal of competence that can give us good reason to think we need not assist. On the contrary, this idea of competence even more obviously generates duties to assist within Regan's theoretical framework than the idea of competence as 'highly capable of surviving' without human aid. So it cannot be that this is the kind of competence that Regan has in mind when he talks about animals' greater competence at survival. Neither definition of competence gets Regan the conclusion he wants.

Perhaps Regan is not thinking of competence in either of these ways, but is instead conflating the competence of individuals of a species to survive with the ‘competence’ of the species to persist. This would explain why he says that predator and prey only exist because their progenitors were competent at survival. But this way of understanding the grounds for our duties to animals runs counter to the whole of Regan’s theory in that the morally relevant feature is no longer the welfare of the individuals involved, but the persistence of the species. Elsewhere, Regan emphasizes that no moral preference is to be given to individuals of species that are endangered.

I conclude that Regan’s general duty of beneficence calls upon us to assist any young animal (*not* species) that is not ‘highly capable of surviving without human aid.’ At minimum this means intervening when we happen to run into a young animal that is threatened or suffering but no moral agent is responsible. But it also seems to require seeking them out to help them. If we agree that we should do this for human children who may be threatened by predators or with disease, and so on, then we should also do it for the young of nonhumans.²²⁹ When natural disasters occur, we must assist animals. When mothers are injured or unable to adequately care for or defend their young, we must assist. When diseases strike, we must assist. This is a rigorous duty of assistance – quite the contrary of what Regan set out to do in his revised preface to *The Case*.

Singer’s conclusions on how we ought to treat wild animals living ‘in the wild’ are similar to Regan’s. We ought not to hunt them since this often results in painful deaths. Hunting for sport is never permissible, and hunting to control populations is not

229. Regan limits the scope of his account, for the sake of argument, to adult mammals one year or older. He might point to this limitation in order to avoid some of the force of the argument I am making here. In doing so, however, he would be avoiding the question of what to do in such cases as he did in the original printing of his book, rather than directly answering my critique.

permissible, so far as more humane options, such as sterilization, are feasible. Even so, Singer only thinks that it may be right to take action in cases of overpopulation. His clearest statement on the question of how to treat wild animals living in the wild tells in the other direction. He says it is “conceivable that human interference will improve the conditions of animals, and so be justifiable”²³⁰ if it remains an exception rather than a rule – in one-off cases of rescue from natural disaster, for instance. He is adamant that larger-scale efforts, such as the “elimination of a carnivorous species...[as with] any attempt to change ecological systems...is going to do more harm than good.”²³¹ In light of our history of doing harm where we have intended only good, Singer concludes that we ought to leave nature be.

The problem with Singer’s argument is that it is not supported by his commitment to maximizing the satisfaction of preferences across individuals. It is not hard to imagine sterilizing predators one by one, for instance, until the last individual of each predatory species dies of natural causes. In this way, the painful deaths that prey often suffer in the claws and jaws of predators, as well as the ongoing anxiety and fear that prey often have in close proximity to predators could be eliminated once and for all. Proper management of prey species could include an ongoing sterilization program that leaves just enough fertile individuals to maintain a sustainable population. Habitats could then be greatly modified so that they support more nutritious plants, which in turn could sustain larger prey populations. It seems plausible that this state of affairs, rather than one in which we leave nature be, would maximize preference satisfaction. But if this is so, then it is not

230. Singer, *Animal Liberation*, 226.

231. Singer, *Animal Liberation*, Ibid.

clear why we ought to leave nature be. Without recourse to the value of the species or of the ecosystems themselves, Singer's call for ecological humility is under-motivated. So neither Regan's nor Singer's accounts actually supports the idea that we ought to 'leave wild animals be.'

Nussbaum views nature as fundamentally unjust in that it is fraught with violence and inequality. Ideally, wherever we can, she thinks that we ought to try to make nature just by replacing unjust relationships with just ones. But even so, she warns, we must proceed with caution. If we move too quickly, we risk doing more harm than good in our efforts to make nature just.

Yet in spite of her insistence that she does not advocate widespread intervention in nature – at least not in the short term, where this is understood as increasing our efforts to reshape it – Nussbaum's advocacy of a 'cautious advance' only sets the stage for more radical intervention in the future. It is not hard to see her approach recommending a path forward very much like the one I described above for Singer's account. Perhaps it would not go as far as Singer's – maybe predators would not be made extinct, but reduced to minimal sustainable populations and fed only animals that are already dead. Though, again, without any appeals to the value of species or ecosystems to tell against causing extinction, it is not clear why she would want to keep such a population alive. The short-term goal would need to be to find ways to gradually unravel the web of relations in ecosystems in such a way that animals aren't harmed in the process, engineering extinctions wherever necessary in order to promote more harmonious relations.

F. How My Capabilities Approach Explains the LFI

In this section I argue that by incorporating Palmer's idea that we have duties toward animals that are grounded in what we have done to make them vulnerable into my version of the capabilities approach, I am better able to account for the laissez-faire intuition than Regan, Singer, or Nussbaum.

I have already argued that Nussbaum's reasoning, like Singer's, supports the conclusion that we ought to work to make nature just. However, Singer and Nussbaum's reasoning is unconvincing for a deeper reason. Namely, the moral judgments that underly the laissez-faire intuition do not center on our practical inability to make nature just, as Singer and Nussbaum suggest. They lie instead in the idea that we do not have a responsibility to make nature just – if what we mean by 'justice' is the removal of all of the painful or otherwise harmful relationships that constitute ecosystems.

Palmer's account of the laissez-faire intuition, on the other hand, explains why *in principle* we do not have to try to make nature just: To put it simply, we *are not* morally responsible for what *animals do to each other*, but we *are* morally responsible for what *we do to them*. Further, just as in our relationships with other humans we have moral responsibilities toward some individuals that we do not have toward others by virtue of how we are related to them, so, too, we have moral responsibilities toward some animals that we do not have toward others by virtue of how we are related to them. In particular, we have moral responsibilities to assist individuals whom we have harmed or made more vulnerable to harm that we do not have toward individuals whom we have not harmed or made more vulnerable to harm.²³²

232. To use Palmer's deontological jargon, we have duties to assist.

Palmer thinks that a capabilities approach cannot account for the intuition in this way since it “cannot straightforwardly incorporate backward-looking concerns and social relations both of which I have argued to be important.”²³³ If Nussbaum’s capabilities approach were the only version of the approach, as it is the only version of the approach that Palmer seems to consider, then I would be inclined to agree with her assessment of it. But a capabilities theorist does not have to leave off backward-looking concerns as Nussbaum has. I argue that contrary to what Palmer thinks, Palmer’s own notion of morally relevant vulnerabilities is easily incorporated into a capabilities framework.

Together with Nussbaum, I begin with the idea that flourishing is good and that it is therefore good for individuals that are capable of flourishing to have the opportunity to flourish. However, I part ways with Nussbaum in my judgment that the value of others’ flourishing is not enough to make us morally responsible for whether or not they are able to flourish. Rather, we become more or less morally responsible and differently responsible for providing them that opportunity depending on the role we have played in harming them or in making them vulnerable to harm.

The basic idea is this: We are morally responsible for any harm that we cause. If we have made individuals vulnerable to harm, this is not itself a harm, and so, not morally wrong. However, if they are harmed, then to the extent that they would not have been harmed had we not made them vulnerable, we have caused the harm, thereby wronging them. It follows from this that in order to keep from wronging the individuals we have made vulnerable, we ought to do what we can to enable them to flourish in spite of their increased vulnerability.

233. Palmer, *Animal Ethics*, 164.

Moreover, for the very same reason, we should not make individuals vulnerable unless we are able and willing to care for them in the ways that are necessary in order to prevent them from being harmed on account of their increased vulnerability. To the extent that we make individuals vulnerable, yet we are unable to care for them or do not do so, and they are harmed as a result, we have wronged them. Again, it is the fact that we have made them more vulnerable that grounds our responsibility to see to it that they are not harmed as the result. But we do not have any similar responsibility to care for those we have not made vulnerable precisely because we have not made them vulnerable.

Politically, this means that the fact that it is good for animals to flourish *does not* generate claims against the state to supply each individual *the same* opportunity to flourish, or even a minimum threshold level opportunity to flourish. Justice is instead concerned with *rightly mediating human actions and institutions* that get in the way of flourishing. I will say more about this shortly.

For now I want to spend some time looking at how our relationships with (1) domesticated animals and wild animals that are functionally dependent on us and whose environments we intensively shape and control differ from our relationships with (2) wild animals living in the wild, that is, those whose environments we do not shape or control as intensively, and how these differences in relationship translate into differences in moral responsibility.²³⁴ I consider functional dependence together with constitutive dependence since the key distinction is not between genetic and extra-genetic dependence, but between the kinds of environments an animal can flourish in and the role

234. For the sake of consistency, although I incorporate Palmer's understanding of morally relevant vulnerability into my capabilities framework, I do not adopt her use of the terms 'domesticated' and 'wild.' Rather, I continue to use these terms as Nussbaum uses them and as I have been using them throughout my project (see chapter 2, section I for a detailed articulation of the terms).

we have played in creating or maintaining those environments and in making different animals dependent on different kinds of environments.

We have made domesticated animals constitutively dependent by selectively breeding their ancestors. As the result of this process of selective breeding, they are not able to flourish or in many cases even able to survive without ongoing human care and intensive control over their environments. All domesticated animals are constitutively dependent. We have also made some wild animals functionally dependent on us through our sustained, intensive interaction with them. Often, wild animals living in captivity learn to interact with us and to depend on us for their basic needs to such an extent that they can no longer flourish let alone survive if they are placed ‘in the wild.’

In addition, we make many animals vulnerable by directly controlling various aspects of their lives – what I call, following Palmer’s terminology, *external dependence*.²³⁵ This is different from constitutive dependence in that an animal that is made vulnerable by directly controlling many aspects of its life may yet be able to flourish without such control. Consider the example of wild animals living in captivity that have not been in captivity for long or who have still had minimal interaction with their human captors. Such individuals are very dependent on direct human care for many aspects of their lives. But they could still flourish if they were placed in wild habitats, so they are not constitutively or functionally dependent.

235. I distinguish between constitutive, functional, and external dependence, whereas Palmer works with the notions of internal and external dependence. Her notion of internal dependence roughly corresponds to my constitutive dependence, and her notion of external dependence is the same as mine. It is not clear where functionally dependent animals would fit on her account, but I would suspect that they would be included as a kind of constitutive dependence that wild animals can have. See *Animal Ethics*...91 – 95.

We confine domesticated animals and wild animals living in captivity to spaces that are too small for sufficient exercise unless we ‘let them out’ and spaces that do not include sufficient food to sustain them, so we must ‘feed them’ with food that we bring in from ‘outside.’ Social animals cannot have the kinds of interactions they need in order to flourish unless we bring them to others of their own species or we bring others of their own species to them. They cannot play, for instance, without some positive action on our part to make this possible. Nor can they breed without similar human providence. Predators likewise cannot exercise their predatory instinct unless we provide them with simulations of encounters with prey or opportunities to prey from time to time, and so on and so forth.

The kind of care that we owe domesticated animals is very similar to the care we owe functionally dependent wild animals. In either case, we must feed and water them and provide them with adequate veterinary care. We must give them sufficient room to move around in the right kinds of environments, e.g., environments that provide opportunities to dig if one’s species digs, or climb if one’s species climbs, or run, and so on, and these environments must be sufficiently sensibly and mentally stimulating. We must play with them or, if they are not the kinds of beings that flourish by playing with humans or only with humans, we must provide them with opportunities to play with others of their own species. We must provide sufficient opportunities for predators to exercise their hunting instinct, and so on.

Human beings also make wild animals living in the wild more vulnerable in a variety of ways. Among the most obvious and common are activities that damage or destroy their habitats. When humans degrade wild animal habitats, we force them to

make due with environments that are less suitable for obtaining food or shelter than what they had before. One common way that humans degrade wild animal habitats is by removing predators. This leads to increases in prey populations that further degrade habitats, and this, in turn, makes it harder for individuals of many species living in the habitat to find adequate food. When we destroy their habitats outright, wild animals are often injured or killed in the process. But otherwise the negative affects of habitat destruction on wild animal lives are much the same as the negative affects of habitat degradation: Wild animals are forced into nearby areas that are often less suitable for obtaining food or shelter than the old ones or that are already inhabited by a population of the same species. This makes flourishing more difficult by increasing competition for limited resources.

The kind of care that we owe wild animals living in the wild differs substantially from the kind that we owe to domesticated animals or wild animals that are functionally dependent on us. Guaranteeing wild animals that are not functionally dependent on us the opportunity to flourish is primarily a matter of preserving and managing habitats of sufficient quality and quantity. A lot goes into this. For now I will focus on a few of the more obvious things that we must do.

To ensure that such habitats are available for wild animals, the first thing that we must do is to reconceive development and resource extraction as taking place in wild animal habitats rather than as replacing these habitats. That is, we must learn to see ourselves as sharing these habitats with wild animals and aiming to modify them in ways that take their opportunities to flourish into serious consideration. Where individuals or corporations are unwilling of their own accord to see human interactions with animals

and their habitats in this light, they must be made to act as though they did through force of law. Businesses involved in the development of animal habitats for whatever purpose must be required to sacrifice efficiency, convenience, and comfort so that individuals of a variety of species can coexist in our neighborhoods and around our homes.

The second thing we must do in order to ensure that wild animals living in the wild have suitable habitats is to drastically reduce greenhouse gas emissions in order to limit the effects of global climate change on these habitats. This task is made especially difficult by the global scope of the problem, but reduction must be achieved. Also, as Palmer notes, whenever we are unable to prevent the harm caused by global climate change, we must act so as to minimize harm – by expanding protected areas to offset for degraded habitats, providing extra food for animals as needed and the like.

One might think that the best way to restore an ecosystem whose predators are missing because we have hunted or trapped them is to reintroduce them into that ecosystem. However, matters are not so simple. In an ecosystem whose predators have been removed by human activities, we have no moral responsibility to keep predators from killing prey. But if we have removed predators from an ecosystem, if we were to reintroduce predators into that ecosystem, we would make the prey that are living there more vulnerable. And when these predators killed their prey, we would be to some degree morally responsible. So where we have extricated predators from their habitats, we must do what we can to control prey populations without killing or harming prey. This might be achieved without reintroducing predators – through sterilization programs, for instance.

A strong case can be made on my capabilities approach for reintroducing predators if we take into account the value of whole ecosystems. The effect on predators across several trophic levels in an ecosystem – what is called a *trophic cascade* in ecology – is an essential component of ecosystem health.²³⁶ Numerous studies have shown that ecosystems whose apex predators have been removed suffer from significant changes in vegetative structure, soil health, and reductions in biodiversity, and evidence is mounting that these negative effects are typical rather than exceptional. So if ecosystems are subjects of moral consideration and of justice, reintroducing predators is a part of treating them justly.

I have argued elsewhere that ecosystems are subjects of justice and that they therefore ought to receive legal protection.²³⁷ I will not rehash my arguments here, but it is instructive to note that in order to avoid genuine moral dilemmas between caring for predators we have made vulnerable and caring for prey we have made vulnerable, the best policy is to protect predators from being hunted or trapped out of an area and to protect wild animal habitats in the first place. That is, the first and best policy for treating wild animals ‘living in the wild’ justly is also the first and best policy for treating ecosystems justly.

236. The negative effects of extirpating sea otters from the Kelp Forest ecosystem off the coast of Alaska have been widely documented. See Reisewitz S.E., J.A. Estes, and C.A. Simenstadt, “Indirect Food Web Interactions: Sea Otters and Kelp Forest Fishes in the Aleutian Archipelago.” In *Oecologia*, Vol. 146, No. 4 (January 2006), for instance. But such effects have also been observed in many other ecosystems, including salt marsh ecosystems in the southern Pacific, rain forests in Brazil, and in the western United States with the reintroduction of wolves into Yellowstone National Park (See Silliman, B.R. and C. Angelini, “Trophic Cascades Across Diverse Plant Ecosystems.” In *Nature Education Knowledge*, Vol. 3, No. 10 (2012).

237. See Daniel L. Crescenzo, “Loose Integrity and Ecosystem Justice on Nussbaum’s Capabilities Approach” in *Environmental Philosophy*, Vol. X, No. II (Fall 2013). See also David Schlosberg’s “Justice, Ecological Integrity, and Climate Change” in *Ethical Adaptation to Climate Change: Human Virtues of The Future*, Eds. Allen Thompson and Jeremy Bendik-Keymer, Cambridge: The MIT Press, 2012: 165 – 183 – whose work in this area has greatly influenced my thinking.

This best policy should be understood more broadly to include non-predatory species, populations, and abiotic elements from ecosystems as well. Removing old-growth trees in the Pacific Northwest, for instance, has created habitats that are less suitable for Spotted Owls and more suitable for Barred Owls. As a result, many Spotted Owls have been made vulnerable to harm in ways that they were not before. It is becoming increasingly difficult for them to find food and to survive, and they are facing increasing competition from the more adaptable Barred Owls. Recent USFS draft plans have recommended culling of the Barred Owls to offset their competitive advantage. But note, again, that we will be responsible for Barred Owl deaths if we do so, just as we are now responsible for Spotted Owl deaths and hardships that came as the result of our lumbering practices. It would have been better not to have destroyed so much of their old growth habitat in the first place.²³⁸

Up to this point I have been using the collective ‘we’ throughout this section to talk about ‘our’ responsibilities toward animals in a very general way, to address a variety of individual and collective actors. Before I finish, I want to say something more about who is responsible for what.

In each case, those individual(s), companies, or governments that breed domesticated animals or take them into their care, or that keep wild animals in captivity, bear the primary moral responsibility for caring for them. If one adopts a companion animal, it is one’s moral responsibility to care for it. If a company breeds animals and keeps them on a farm, it is their moral responsibility to care for them and their offspring or to find caretakers who will, and so on. Laws must include stiff penalties for failure to

238. See “A Slide Toward Extinction” on *Willamette Live.com*. May 12, 2016. <http://www.willamettelive.com/2016/news/slide-toward-extinction/>.

fulfill these responsibilities. Similarly, those who degrade or destroy wild habitats for the purposes of commercial or residential development and the like bear the primary moral responsibility for caring for them. Wherever the law permits these activities, it must also require those who engage in them to draft plans to adequately compensate the animals affected (rather than some other group of individuals) and strictly enforce compliance with these plans.

However, there will be times when causal responsibility is difficult to ascertain, when it is impossible for those responsible to provide the appropriate kinds of care, or when one could not have reasonably foreseen negative impacts on animal lives. In these cases, since the harms involved are facilitated by the dominant social and cultural institutions in Western liberal societies, these societies have a collective moral responsibility to care for these animals in the requisite ways. In Western democracies, the state has the primary responsibility for fulfilling this collective moral responsibility.

It should be clear by now the way in which the incorporation of Palmer's causal vulnerability account of the *laissez-faire* intuition into my capabilities approach explains the intuitive judgment. It turns out that our responsibilities to domestic animals and wild animals that are functionally dependent on us are more intimate, intensive, and comprehensive because we have made them vulnerable in ways that prevent them from flourishing without such care. This is the root of our judgments that we have responsibilities to them that we do not have or do not have as strongly to wild animals living in the wild.

In contrast, we have made wild animals living in the wild vulnerable in ways that call upon us to preserve and to maintain wild habitats without any great intimacy with

humans. We do not have any responsibility to keep animals from harming one another since we are not causing *this* harm. We therefore have good reason to protect and to manage their habitats so as to ensure them the opportunity to flourish in those habitats. That is, we have good reason to ‘leave them be.’ Returning to Regan’s case of the human child who is about to be attacked by a predator, we now see that not only is the child more valuable by virtue of its form of life, but human children’s vulnerability can always be traced back to the actions of human moral agents. The same cannot be said for the vulnerability of a wild animal or its offspring.

I have said enough to conclude that my capabilities approach plausibly explains the laissez-faire intuition, whereas neither Nussbaum nor Regan nor Singer are able to do. My account is in this respect superior to some major competing accounts in contemporary animal ethics.

G. Conclusion

I have argued for a version of the capabilities approach that is methodologically egalitarian and includes a strict inegalitarian life-form hierarchy of value at its core. These aspects of my capabilities approach explain why the human not-meriting intuition is not speciesist and avoid the problem of morally relevant inequalities that social contract theories face. The life-form hierarchy of value in particular sets it apart from Nussbaum’s version of the capabilities approach. I have also argued for a version of the capabilities approach that incorporates the idea that humans are morally responsible for the harms that animals suffer as the result of our having made them vulnerable, whereas we are not responsible for the ways in which animals harm one another. This aspect of

my capabilities approach also sets it apart from Nussbaum's version of the approach and enables it to explain the laissez-faire intuition, whereas Nussbaum's version, as well as Regan's animal rights and Singer's animal welfare approaches cannot. I conclude that my capabilities approach provides a better framework for including animals as subjects of justice in Western liberal societies than Nussbaum's version of the approach, Regan's animal rights, Singer's animal welfare, or any kind of social contract theory.

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