

JUSTICE FOR ALL?: THE SHORTCOMINGS AND POTENTIALS OF THE CAPABILITIES APPROACH FOR PROTECTING ANIMALS

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*In her book, *Frontiers of Justice*, Martha Nussbaum sets out to build upon, and re-envision, John Rawls' theory of justice. Her goal is to establish a conception of justice that extends to three classes that are not adequately captured in Rawls' work: people with disabilities, people living in different countries, and nonhuman animals. This Note takes on the last of those three extensions, nonhuman animals. Part I presents a brief overview of the major scholarly approaches to conceptualizing animal rights. Part II lays out the capabilities approach in detail, focusing particularly on its application to nonhuman animals. Part III analyzes the areas in which Nussbaum creates inconsistencies that weaken both her theory's capacity to extend justice to animals and its overall logical soundness. Finally, Part IV presents two key entitlements, the right not to be used solely for human benefit and the right not to be used for profit, that create a stronger, more comprehensive approach to including animals within a framework of justice.*

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* © Jennifer Davidson received her J.D. from the University of Virginia School of Law in 2018. She would like to thank Professor Margaret Riley for her advice, guidance, and feedback in crafting this Note. She would also like to thank Amy Albert for her support throughout the process.

I. THE THEORETICAL LANDSCAPE FOR GRANTING PROTECTIONS TO ANIMALS

This Note focuses on Martha Nussbaum's contributions to a larger conversation on conceptualizing the interaction between humans and animals. It evaluates Nussbaum's work for its potential to create a rigorous and comprehensive account of rights and protections for other species.¹ Although the initial critiques raised aim to be objective and are framed in terms of the logical gaps or tensions within her argument, this Note also starts from a normative stance grounded in a rights-based, deontological-leaning approach to defining the human-animal relationship.² The suggestions given for strengthening Nussbaum's arguments, while filling in perceived gaps and inconsistencies, are also inherently aimed at bringing her work in line with a theory capable of granting fuller, robust rights to animals.³

As such, to understand the unique contributions Nussbaum makes and the goals of this Note, it is also important to understand the broader landscape in which the conversation sits. In recent years, many scholars have begun deeply and carefully reassessing humans' relationship with animals. Scholars have arrived at a vast range of theories, each with their own reasons for why humans should be concerned with how they treat animals and what the extent of those concerns should be. Ultimately, while all nuanced and diverse, these theories can be sorted into a few broad categories that can be useful in distinguishing their varied paths and ends.

For some theorists, cognitive ability is the starting point for allocating relative levels of protection and entitlements. Steven Wise, through the Nonhuman Rights Project, is a leading example of this school of thought. Wise draws a distinction between equality rights and liberty rights.⁴ Equality rights demand that 'likes' are treated alike and thus call for comparing one "rightless" animal to another, ensuring that they are both treated the same.⁵ More central to Wise's specific theoretical contribution are liberty rights, which entitle one to be treated a certain way "because of how one is constructed, especially

¹ While acknowledging that humans are indeed animals themselves, for the sake of clarity, this Note will use the term 'animals' as non-inclusive of humans, unless otherwise noted.

² The meaning of this approach will be discussed further below.

³ Understanding the stance from which this Note enters is particularly important because this stance is likely, at least to some degree, in tension with Nussbaum's own stance and goals in formulating her theory. Nussbaum is, first and foremost, likely aiming this particular work towards an audience of philosophers and political scientists, not animal rights activists. Nonetheless, it does not change the inconsistencies raised by certain choices she makes in it, nor does it limit the potential for her theory to be the basis for a much stronger and robust understanding of animal rights.

⁴ Steven Wise, *Animal Rights, One Step at a Time*, in ANIMAL RIGHTS 19, 30 (Cass Sunstein & Martha Nussbaum eds., 2004).

⁵ *Id.*

one's mental abilities."⁶ According to Wise, although liberty does not grant the total freedom to do whatever one pleases, it covers certain core entitlements that are considered essentially absolute, namely bodily liberty and integrity.⁷

Autonomy is critical to Wise's conception of granting rights to animals.⁸ Any being that meets the requirements for practical autonomy is entitled to basic liberty rights (although even if lacking in autonomy, the being may still be entitled to certain equality rights).⁹ Practical autonomy, as defined by Wise, entails three key facets. The being must be able to: (1) desire; (2) intentionally try to fulfill its desire; and (3) possess a sense of self-sufficiency to allow it to understand, even at the most basic level, that it is a being that wants something and is trying to get it.¹⁰ Using the work of Professor Donald Griffin, a leading scholar of cognitive animal behavior, Wise assigns "precise autonomy" values to animals, based on factors such as whether an animal feels, wants, or acts intentionally.¹¹ Animals assigned a high autonomy value are placed into "category one" and, according to Wise, "clearly" possess practical autonomy sufficient for basic liberty rights.¹² Wise then defines three other categories, each with increasingly lower levels of autonomy, and grants the degree of rights those animals hold accordingly.¹³ Thus, Wise's approach to which animals should get which rights and why hinges almost entirely on a scientific conception of autonomy. Wise is not alone in this conception; many other scholars have also arrived at cognition levels as the foundation for rights.¹⁴

On a different end of the spectrum, for other theorists, it is the bare capacity to feel pain and suffering that forms their foundation, although why and how pain matters can be taken in a range of ways. Utilitarian theorists frequently analyze the ability to feel pain as a key tenant in their approach. Broadly speaking, utilitarians believe that an action or practice is 'right' if it creates the greatest potential balance of good consequences and/or the least potential balance of bad consequences as a whole for all affected parties.¹⁵ Utilitarian theorists, therefore, each define what is considered 'good' and whose good mat-

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 32.

¹¹ *Id.* at 33.

¹² *Id.*

¹³ *Id.* at 33–34.

¹⁴ For example, Peter Singer, most famous for his utilitarian framework discussed further below, and Paola Cavalieri were two of the original conceivers of *The Great Ape Project*, which focuses on great apes' high cognition levels as a ground for calling for rights for them. *History*, THE GREAT APE PROJECT, <http://www.projetoap.org.br/en/history> [<https://perma.cc/EV9R-YQDR>] (accessed Aug. 3, 2018).

¹⁵ TOM BEAUCHAMP ET AL., *THE HUMAN USE OF ANIMALS: CASE STUDIES IN ETHICAL CHOICE* 19 (2d ed. 2008).

ters.¹⁶ Because of its focus on consequences, it means that every choice must have a justification, including, for example, the potential choice to exclude certain animals from consideration.¹⁷ Jeremy Bentham is one of the most famous early utilitarians. He argued that animals, like humans, can feel pain and therefore are worthy of moral protections.¹⁸ This conception of focusing on the overall welfare of beings, defined in part by suffering, became the touchstone for many of the most popular conceptions of animal rights today.¹⁹

Peter Singer is one of the most cited theorists espousing a utilitarian framework for granting rights and protections to animals. Singer is influenced by Bentham's ideas, arguing that from a utilitarian standpoint, if a being suffers (largely meaning if a being feels pain), then there can be no moral justification for refusing to take their suffering into consideration when determining what actions are socially accepted.²⁰ Singer (as do many other scholars) uses the phrase "speciesism" to describe the way in which humans treat animals as inherently lesser beings that are undeserving of the same protections as they grant themselves.²¹ He analogizes speciesism to phenomena like sexism and racism.²²

Ultimately, the crux of Singer's argument is equality of consideration.²³ To take killing another creature as an example, beings that are similar in all relevant respects have a similar right to life. Mere membership in humans' own biological species cannot be a morally relevant criterion for this right.²⁴ Thus, if capacity for self-awareness, ability to plan for the future, and capacity for forming meaningful relationships are factors that make it worse to kill a creature, then those criteria must be applied across the board. He takes this argument to its full end, meaning that a chimpanzee or pig would have a greater right to life than an intellectually disabled infant or an elderly person in late-stage dementia.²⁵ Rejecting speciesism does not mean that all lives are of equal worth; it means that all lives are regarded equally across similar characteristics.²⁶

Finally, the last major grouping of theories falls under what is called a deontological approach. These theories are also sometimes referred to as Kantian, in homage to the work of philosopher Immanuel

¹⁶ *Id.* at 20.

¹⁷ *Id.*

¹⁸ *Id.* at 21.

¹⁹ *Id.*

²⁰ Peter Singer, *Animal Liberation*, in *ANIMAL RIGHTS: THE CHANGING DEBATES* 7, 9 (Robert Garner ed., 1996).

²¹ PETER SINGER, *ANIMAL LIBERATION* 6 (1977).

²² *Id.*

²³ *Id.* at 8.

²⁴ *Id.* at 20. Those qualities are examples Singer uses, but do not necessarily represent the qualities that would *have* to be used. The key is that whatever qualities are chosen, they must be applied equally across all species.

²⁵ *Id.* at 20–21.

²⁶ *Id.*

Kant.²⁷ Kant's overarching principle in his work was defining "moral law."²⁸ Most important for the theories that stem from his line of thinking is the requirement that individuals are to never be treated as means to one's own ends—humanity is only to be an end, in and of itself.²⁹ Deontological theorists extend Kant's work to capture animals too as ends in and of themselves. Thus, any protections granted stem from the beings themselves, not from their perceived cognition or utility.³⁰

A leading proponent of deontological theory is Tom Regan. Regan, at his simplest, defines animal rights as the basic idea that animals have a right to be treated with respect.³¹ However, Regan moves much deeper than this and focuses most of his analysis on moral rights. He starts by considering the specific scope of rights conferred to humans. Regan looks at two key rules that he views as protected by moral rights: beings are not free to harm other beings, and beings are not free to interfere with other beings' free choice.³² Additionally, Regan also believes that moral status confers equality—he views equality as the explanation for why humans cannot justifiably be denied rights for arbitrary or morally irrelevant reasons.³³

After considering a variety of explanations he considers to be unsatisfactory,³⁴ Regan ultimately argues that what matters is that humans are a "subject-of-a-life."³⁵ He uses this term because he views "human being" as inadequate, based on the fact that deceased humans no longer have rights, and "person" in the philosophical sense³⁶ as likewise insufficient because infants are not considered to be persons, but nonetheless have many rights.³⁷ For Regan, subject-of-a-life captures the broadest common denominator of human experiences: sameness, awareness of the world, a caring towards what happens to oneself, equality, and so forth.³⁸

Awareness lies at the root of Regan's analysis, and he uses awareness to determine whether animals beyond humans may be subjects-of-a-life. He asks the question: "Among the billions of nonhuman ani-

²⁷ BEAUCHAMP ET AL., *supra* note 15, at 23. Kantian philosophy will play an underlying role in Nussbaum's approach as well.

²⁸ *Id.*

²⁹ *Id.* It is important to note that Kant himself did not call for granting rights to animals. In fact, he specifically viewed animals as man's instruments and as means only. *Id.* at 24.

³⁰ *Id.*

³¹ TOM REGAN, *EMPTY CAGES: FACING THE CHALLENGE OF ANIMAL RIGHTS* 9 (2004).

³² *Id.* at 39.

³³ *Id.*

³⁴ *See id.* at 44–49 (considering explanations ranging from being self-aware to having God-given rights).

³⁵ *Id.* at 50.

³⁶ Person is used by Regan to mean individuals who are morally responsible for their behavior. *Id.* at 45.

³⁷ *Id.* at 50.

³⁸ *Id.* at 51.

imals in the world, are there any who are aware of the world and aware of what happens to them? If there are, does what happens to them matter to them, whether anyone else cares about this or not?"³⁹ If answered affirmatively, Regan views this as meaning that those animals are subjects-of-a-life and therefore have the same rights as humans.⁴⁰ To answer this question, Regan takes what he calls a "common sense approach."⁴¹ Regan also looks at other factors, including the common behaviors between humans and other animals (such as trying to escape a pen if the dog wants to be out of it, like a human would try to escape a confined space), the overall similarity in bodies (with most animals also having brains, nervous systems, and other relevant systems), and, invoking the work of Charles Darwin, the common origins of animals.⁴² From here, Regan concludes that in fact there are many animals that are subjects-of-a-life and are therefore entitled to the same basic moral rights that humans receive.⁴³

Another leading deontological scholar, Gary Francione (whose work will be discussed more extensively throughout this Note), roots his beliefs in a somewhat different framework. Similarly to Regan, Francione rejects notions that humans are somehow "inherently" different from other animals in all meaningful ways, in part by pointing out scientific findings of how characteristics once thought to be "uniquely human" are in fact visible widely in animals.⁴⁴ He further questions the moral significance of the characteristics that are relatively unique to humans and argues that these characteristics still lack any logical foundation for the notion that animals exist solely for human use.⁴⁵ Francione's starting point is his observation that, at least in many parts of the world, most people actively say they want to avoid causing animals unnecessary suffering, but nonetheless support the infliction of widespread avoidable suffering on many animals anyways (Francione refers to this phenomenon as "moral schizophrenia").⁴⁶ Francione proposes that there is only one way to take animal interests seriously and give content to humans' professed rejection of inflicting unnecessary suffering: applying the "principle of equal consideration," or the rule that we must treat likes alike, to animals.⁴⁷

Although this sounds similar to Singer, Francione takes it to a different end. His key qualm is that animals are currently legally re-

³⁹ *Id.* at 53.

⁴⁰ *Id.*

⁴¹ For example, Regan talks about how anybody who has encountered dogs, just on a common-sense level, knows they are aware of and care about what is happening to them. *Id.* at 54.

⁴² *Id.* at 55–58.

⁴³ *Id.*

⁴⁴ Gary Francione, *Animals—Property or Persons?*, in *ANIMAL RIGHTS* 108, 129 (Cass Sunstein & Martha Nussbaum eds., 2004).

⁴⁵ *Id.*

⁴⁶ GARY FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? xxiv (2000) [hereinafter *ANIMAL RIGHTS*].

⁴⁷ *Id.* at xxv.

garded as property, meaning that humans can do essentially whatever they want to them.⁴⁸ A commodity has no value other than what the property owner assigns to it.⁴⁹ The treatment of animals as property means that any attempt at balancing the interests of humans versus animals will be fundamentally off, because at its core, it is the balancing of the interests of the property owner and the interests of the property. Property, however, cannot exercise any meaningful interests.⁵⁰ As such, the human interests will, when push comes to shove, always prevail.⁵¹ In order to give true consideration to animal interests, Francione argues that humans must afford sentient animals⁵² the basic right to not be treated as property.⁵³ This would not protect animals from all suffering, but instead would just mean that animals can no longer be used as resources by humans and therefore would be protected from suffering in that capacity.⁵⁴ Animals would be considered moral persons with morally significant interests that must be respected.⁵⁵

Finally, there is a broad distinction commonly made within discussions of animal advocacy: welfare versus rights. The various frameworks discussed above could each fit into one of these two categories, depending on where the theorist in question takes it. Welfare, broadly speaking, aims not to eliminate the human usage of animals, but instead to reduce or eliminate unnecessary suffering—it is not that the animals have their own rights, but instead that humans have limited obligations to protect them from certain types of harm.⁵⁶ Cage free eggs, grass fed beef, and larger pens for pigs are classic examples of welfare reforms. These arguments do not attack the underlying use of the animal, but instead seek to make the conditions animals experience during their lives more pleasant and to minimize net suffering. Rights-based approaches, on the other hand, tend to focus more on the abolition of human's use of animals for their own purposes, rooted in the notion that animals possess their own rights to be free from human utilization.⁵⁷ Instead of improving the conditions of the lives of hens, cows, and pigs used in animal agriculture, rights-based advocates call for an end of the use of hens, cows, and pigs for human agricultural purposes entirely. No doubt this is an overly simplistic image of rights

⁴⁸ *Id.*

⁴⁹ Francione, *supra* note 44, at 116.

⁵⁰ *See id.* at 116–17 (implying that property cannot exercise any meaningful interests).

⁵¹ *Id.* at 117.

⁵² Francione identifies sentient beings as ones who use “sensations of pain and suffering to escape situations that threaten their lives and sensations of pleasure to pursue situations that enhance their lives.” He uses sentience as a basic threshold for conferring rights. *Id.* at 127.

⁵³ *Id.* at 125.

⁵⁴ *Id.*

⁵⁵ *Id.* at 131.

⁵⁶ BEAUCHAMP ET AL., *supra* note 15, at 26.

⁵⁷ *Id.*

versus welfare, and more realistically, many theories involve a combination of the two or sit somewhere in the middle. However, the general framework is helpful for illuminating and thinking about the end goals of animal scholarship.

II. UNDERSTANDING THE CAPABILITIES APPROACH

A. *The Role of Rawlsian Social Contract Theory*

In *Frontiers of Justice*, Martha Nussbaum builds upon her previous work to flesh out her philosophical vision of what justice means and how society can achieve it.⁵⁸ Nussbaum specifically seeks to address what she sees as three critical unsolved problems of social justice: extending justice and equal citizenship to people with physical and mental disabilities; extending justice to all world citizens; and extending justice to nonhuman animals.⁵⁹ Nussbaum primarily works off of approaches to justice rooted in social contract theory, or the concept of a society formed by rational people joining together for their mutual benefit to leave the state of nature and govern themselves via law.⁶⁰ Social contract theorists use a fictional “state of nature” to envision a society that is essentially formed from scratch. Nussbaum specifically grounds her writing in the work of one of the leading modern social contract theorists, John Rawls.⁶¹ She views Rawls as a particularly useful foundation because Rawls himself has openly stated that his work does not adequately capture the three issues she seeks to address within its framework of justice.⁶²

As mentioned, Rawls starts from a fictionalized state of nature, where every party to what becomes the social contract that creates society is free (not owned by anyone else), equal (not just morally, but also in terms of power and resources), and independent (not under the domination of or asymmetrically dependent on anyone else).⁶³ These are core assumptions that weave throughout the rest of his work. Nussbaum bases much of her approach on two of Rawls’ most central ideas for the formation of society.⁶⁴ First is political liberalism, a political conception of society that purposefully eschews being rooted in religious or metaphysical principles.⁶⁵ Second is the overlapping consensus, the idea that individuals with their own metaphysical and religious beliefs can accept the core basics of the political conception

⁵⁸ See MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE* 3 (2006) (discussing various theories of justice).

⁵⁹ *Id.* at 2–3.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* (citing JOHN RAWLS, *POLITICAL LIBERALISM* 21 (2005)). The inadequacies will be addressed further below.

⁶³ NUSSBAUM, *supra* note 58, at 28–34; see generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (discussing a fictionalized state of nature).

⁶⁴ NUSSBAUM, *supra* note 58, at 6.

⁶⁵ *Id.*

mentioned above.⁶⁶ Rawls, in *A Theory of Justice*, described the “guiding idea” of his work to be that the principles of justice are ones that “free and rational persons concerned to further their own interests” would agree to in an initial position of equality.⁶⁷ By principles of justice, Rawls is referring to the principles required for deciding, amongst various potential social arrangements, how advantage and disadvantage will be distributed in the newly formed society arising out of the state of nature.⁶⁸ Rawls believes that every “person possesses an inviolability founded on justice that even the [greater] welfare of society as a whole cannot override.”⁶⁹ In a just society, equal citizenship is taken as settled; a small group of people can never be “sacrificed” for the greater society’s good.⁷⁰

Rawls imposes a few assumptions on parties to the social contract: a capacity for a sense of justice, a conception of the good, and the powers of reason (defined as judgment, thought, and inference).⁷¹ When individuals hold a minimum degree of these powers, sufficient to create a meaningful existence, then they are fully cooperating members of society who start as equals.⁷² Rawls avoids assumptions of altruism or benevolence on behalf of the parties to the social contract.⁷³ Instead, he assumes that each person is seeking to advance their own notion of the good, and they are not pursuing justice as an end in itself.⁷⁴ However, Rawls does view his principles of justice as ones that free, rational individuals pursuing their own self-interest would accept, if coming from an equality of position,⁷⁵ as defining the fundamental terms of their new association.⁷⁶ Although not explicitly pursuing justice as an end, it still permeates the social contract.

Rawls also takes certain influences from the work of Kantian scholars. Kantian scholars place more emphasis on fairness and mutual acceptability, and less emphasis on mutual advantage.⁷⁷ The Kantian influence in Rawls’ work stems in part from what Rawls calls the “veil of ignorance.” The veil of ignorance refers to informational restrictions impacting all parties to the social contract.⁷⁸ These restrictions mean that the parties do not fully know or understand concepts such as their own race, class, or conception of the good.⁷⁹ Because of

⁶⁶ *Id.*

⁶⁷ RAWLS, *supra* note 63, at 10.

⁶⁸ *Id.* at 11.

⁶⁹ *Id.* at 3.

⁷⁰ *Id.* at 3–4.

⁷¹ RAWLS, *supra* note 62, at 19.

⁷² *Id.*

⁷³ NUSSBAUM, *supra* note 58, at 34.

⁷⁴ *Id.* at 56; RAWLS, *supra* note 63, at 13.

⁷⁵ The equality of position and, as will be discussed, veil of ignorance, are key to explaining how principles of justice are formed in a Rawlsian society.

⁷⁶ RAWLS, *supra* note 63, at 11.

⁷⁷ NUSSBAUM, *supra* note 58, at 54; RAWLS, *supra* note 63, at 12.

⁷⁸ RAWLS, *supra* note 63, at 11.

⁷⁹ *Id.*

the veil, no one in the “state of nature” can create principles solely to favor their particular condition. Thus, the principles of justice that stem from the contract are the result of the fairest possible agreement because they are mutually agreed upon with no asymmetries in power amongst the parties.⁸⁰ The veil of ignorance therefore models a situation of moral impartiality that imbues an overall sense of fairness into the contract and becomes a good in its own right.⁸¹ Rawls believes that these types of moral elements will provide some constraint on the political principles chosen to make them more amenable to mutual conceptions of fairness.⁸²

B. *The Basics of the Capabilities Approach*

Nussbaum’s self-defined goal is to add to, not displace, Rawls’ work.⁸³ However, she is explicitly displacing certain aspects of Rawls’ theory—she believes that there are inherent constraints to his work that result in it ultimately being unable to deliver satisfactory answers to any of the three problems she poses as issues of basic justice.⁸⁴ Indeed, she argues that the underlying assumptions and the ultimate theory of justice Rawls establishes offer “*no principles whatsoever*” to cover and include animals or people with disabilities⁸⁵

Nussbaum takes major issue with the assumption that all people enter the social contract from a place of rough equality of power and resources.⁸⁶ She asserts that the equality assumption “requires us to put some important issues of justice on hold,”⁸⁷ particularly the unique situation of animals and people with severe disabilities. Rawls’ acceptance of the equality assumption therefore has “problematic consequences” for his theory of justice as fairness because it “cannot plausibly” create for justice for either of those groups.⁸⁸ However, as mentioned, Rawls also contains certain Kantian commitments and beliefs in inherent fairness and justice,⁸⁹ which can be at odds with his overall commitment to the classic social contract tradition that focuses on mutual advantage as the good of social cooperation, not fairness.⁹⁰ As such, throughout *Frontiers of Justice*, Nussbaum seeks to document

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 11–12.

⁸³ NUSSBAUM, *supra* note 58, at 6.

⁸⁴ *Id.* at 24.

⁸⁵ In later works, Rawls does offer an extension of how his theory can cover international issues. *Id.* (emphasis in original).

⁸⁶ *Id.* at 31–32.

⁸⁷ *Id.* at 31.

⁸⁸ *Id.* at 31–32.

⁸⁹ *Id.* at 58. Rawls continues to espouse the notion that people may have something to gain from cooperating even with people significantly weaker than them, because there is an inherent good to be gained from cooperation itself. Otherwise, stronger individuals would always dominate weaker ones, if the goal were simply to maximize one’s own good. *Id.* at 62.

⁹⁰ *Id.* at 58.

these tensions within Rawls' theory for the three issues she is addressing.⁹¹

Ultimately, despite her hesitations, Nussbaum chooses not to reject Rawls' or any other contractarian theory, but instead to continue working with alternative ideas, which may potentially enhance understandings of justice and enable the extension of contract-based theories beyond their current limitations.⁹² Nussbaum's work keeps the "intuitive" ideas of reciprocity and fairness embodied in Rawls' writings but "jettison[s]" Rawls' commitment to the social contract, state of nature starting point.⁹³ By doing so, she aims to show that it is possible to solve the lack of inclusion of people with disabilities, international citizens, and animals through the extension of the fairness and reciprocity elements of Rawls' work.⁹⁴

Nussbaum uses what she refers to as the "capabilities approach" to provide the philosophical underpinning for an account of core human⁹⁵ entitlements that are to be respected and implemented by all nations.⁹⁶ Her theory claims that focusing on human capabilities, meaning what people are actually able to do and be, is the best approach to conceptualizing this notion of a basic social minimum.⁹⁷ Nussbaum is informed by what she refers to as an intuitive idea of a "life that is worthy of the dignity of a human being."⁹⁸ To Nussbaum, that means a life where humans have adequate opportunities to pursue varied types of activities of their choosing.⁹⁹ It does not require set amounts of resources per person, but instead requires that humans have rights to be able to do different sorts of life activities.¹⁰⁰ Using this underlying idea of human dignity and a life worthy of it, she identifies a list of basic general capabilities that she views as central requirements in order to have dignity—if humans have these rights in place, it will allow access to the range of other life activities.¹⁰¹ Examples of the minimum protected human capabilities include a life of a 'normal length,' bodily health, bodily integrity, interaction with other species, and control over one's political and material environment.¹⁰² The capabilities approach begins with its desired entitlements and outcomes (dignity) and seeks political procedures to achieve those outcomes as much as possible.¹⁰³

⁹¹ *Id.*

⁹² *Id.* at 25.

⁹³ *Id.* at 67.

⁹⁴ *Id.* at 63.

⁹⁵ Nussbaum's approach, as will be developed, views entitlements as species-specific.

⁹⁶ NUSSBAUM, *supra* note 58, at 70.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 74.

¹⁰⁰ *Id.* at 74–75.

¹⁰¹ *Id.*

¹⁰² *Id.* at 76–77.

¹⁰³ *Id.* at 82.

The capabilities approach is not, Nussbaum asserts, a comprehensive and complete account of justice; it is an account of minimum “core social entitlements” that is compatible with a wide range of views on other issues of justice and distribution that arise once the basic threshold is met.¹⁰⁴ As such, Nussbaum concedes that it does not answer every question left open by Rawls, nor is it trying to do so. Instead, it is a more expansive approach that, while not necessarily accounting for the issues that arise once basic thresholds are met, does include formerly excluded groups into its basic thresholds.¹⁰⁵

C. *How the Capabilities Approach is Extended*

The capabilities approach’s starting point is a “basic wonder at living beings, and a wish for their flourishing and for a world in which creatures of many types flourish.”¹⁰⁶ It was first designed specifically to consider *human* life and dignity, but its basic moral intuition is rooted in the dignity of a “form of life that possesses both abilities and deep needs,” with the goal of addressing the need for a wide diversity of life activities.¹⁰⁷ In this sense, it is able to go beyond the starting point of utilitarian-rooted theories, which take their primary interest in simple pain and pleasure.¹⁰⁸ Nussbaum believes that if humans think of other animals as active beings that have a good they are pursuing in some way, it naturally leads to the further thought that they are entitled to pursue that good.¹⁰⁹ She asserts that through this view of animals as having goods they pursue, it makes humans more readily able to understand the harms caused by blocking them from such pursuits.¹¹⁰ The capabilities approach, which centers on seeing animals as agents seeking their own flourishing, captures this conception of justice well.¹¹¹

At the crux of her argument, Nussbaum advocates for moving beyond one of the most common frameworks for thinking about the human-animal relationship: compassion for animal suffering.¹¹² Compassion itself is an emotion equally evoked by an animal dying in a fur trap or dying of a naturally occurring disease.¹¹³ It involves sympathy stemming from the thought that another being is suffering, but as a framework for granting rights, it does not account for the fact that in the scenarios these rights are meant to target, there is a human to

¹⁰⁴ *Id.* at 75.

¹⁰⁵ *Id.*

¹⁰⁶ Nussbaum is drawing this “basic wonder” primarily from principles derived from the writings of Aristotle. *Id.* at 349.

¹⁰⁷ *Id.* at 346.

¹⁰⁸ *Id.* at 349.

¹⁰⁹ *Id.* at 337.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 336.

¹¹³ *Id.*

blame for the suffering.¹¹⁴ This omission of blame is the first, and major, problem with rooting a theory of human-animal relations in compassion.¹¹⁵

Nussbaum reframes the issue by thinking about compassion not as an emotion, but instead as a duty: it is the notion that it is wrong to cause suffering to animals in and of itself.¹¹⁶ Thus, if a human act causes suffering to an animal, a direct duty stems from compassion to refrain from, inhibit, or punish the act.¹¹⁷ Now, humans are no longer in a place where they can grant ad hoc and revocable protections to animals if they feel sad that an animal is suffering. Instead, for duties of compassion, humans are framed as the ones causing the suffering, and as a result of the duties, animals have direct rights not to be treated that way. This move helps Nussbaum argue that the mistreatment of animals is an issue of *justice*.¹¹⁸ According to Nussbaum, the most basic understanding of when an act is unjust is when the being that is injured by the act has “an entitlement not to be treated that way, and an entitlement of a particularly urgent or basic type.”¹¹⁹ If there is a duty of compassion not to cause suffering, then extended from that is a right. Based on this notion, animals have certain moral entitlements not to be treated in particular ways by humans, and these entitlements make violations an issue of justice.¹²⁰

From there, the capabilities approach is intended to secure a “dignified life”¹²¹ for many different kinds of beings, rooted in its initial goal of securing a dignified life for humans regardless of disability or their location in the world.¹²² Justice, understood as the meaningful opportunity to pursue a flourishing life, is considered to be an intrinsic end pursued by the approach (unlike in Rawls’ work).¹²³ With this understanding of justice in mind, Nussbaum sees no reason that the humans who are defining these principles should not include animals as full subjects of it.¹²⁴ She already establishes pathways towards including animals within a conception of justice through her reframing of duties of compassion. Nussbaum, in contrast to many other scholars, further rejects the notion that only those who can make contracts as

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 337.

¹²⁰ *Id.*

¹²¹ What Nussbaum means by a “dignified life” will be explored in greater detail. See *infra* Part II.D, “In Focus: The Meaning of a Dignified Existence for Animals” (discussing the dignified existence of animals).

¹²² See NUSSBAUM, *supra* note 58, at 350 (“Because they look at the whole of the human world, not just people with resources and powers similar to their own, they are able to be concerned directly and non-derivatively with the good of people with mental disabilities.”).

¹²³ *Id.*

¹²⁴ *Id.*

rough equals can be primary, non-derivative subjects of justice.¹²⁵ She establishes this in part by analogizing the situation to persons with mental disabilities that prevent them from being active parties to choosing and defining the principles of the society.¹²⁶ Nussbaum defines the point of social cooperation as to “live decently together in a world in which many species try to flourish.”¹²⁷ Thus, the mere fact that some people (or beings) are unable to be parties to the decisions does not provide any good reason to suggest the laws should not still be for and about them too, if the goals of such laws are to create justice and the capacity for a multiplicity of life flourishing.¹²⁸ The intuitive ideas of the capabilities approach indicate that all animals that have a good they are seeking to pursue should have real opportunities to pursue it and flourish.¹²⁹

Under the capabilities approach, humans have direct, not derivative, obligations of justice to animals.¹³⁰ This is due, in part, to the duties of compassion: each animal is the subject of a duty of compassion, not the object of a feeling of compassion.¹³¹ Every creature is viewed as an individual, not an aggregate, that has its own diverse ends.¹³² Nussbaum gets to this point by using what she describes as a “complex holistic” method that includes the use of narrative and imagination.¹³³ In Nussbaum’s view, using capacities such as imagination are what help humans experience and try to understand the inner lives not just of other species, but also of other human beings.¹³⁴ As such, through using these methods, humans should be able to understand other species as subjects of justice as well.¹³⁵

D. In Focus: The Meaning of a Dignified Existence for Animals

Nussbaum takes sentience as a basic threshold condition for beings to have justice-based entitlements.¹³⁶ From the outset, however, she emphasizes that capacities “crisscross and overlap,” and that capabilities humans “arrogantly” believe are exclusive to their species are

¹²⁵ *Id.* at 327.

¹²⁶ *See id.* at 350 (stating that though people with mental disabilities are not parties to choosing and defining principles of society, the laws should still be for and about them).

¹²⁷ *Id.* at 351.

¹²⁸ *Id.* at 350.

¹²⁹ *Id.* at 351.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 355.

¹³⁴ *See id.* at 354 (discussing how imagining the lives of others allows humans to understand their suffering).

¹³⁵ *See id.* (explaining that imagination “has been crucial in motivating opposition to cruelty toward animals”).

¹³⁶ *See id.* at 362 (stating that sentience is “central to movement, affiliation, emotion, and thought”).

often found widely in nature.¹³⁷ While Nussbaum does not give exclusive weight to species membership, she does believe it is meaningful in many ways.¹³⁸ For example, a human child with severe mental impairments is still different from a chimpanzee, even if they have comparable cognitive capacities. The child's life is lived exclusively as a human, and the child will flourish (or not flourish) in a human community defined by human norms.¹³⁹ Ultimately, Nussbaum deems it best for humans to not overly engage in second-guessing animal capabilities, but instead to try to observe what each creature seems to indicate is important based off what it actually does.¹⁴⁰

Nussbaum takes a fairly comprehensive but individualistic approach to understanding what a “dignified life” means for different animals. However, she indicates that it would likely include at least the following: “adequate opportunities for nutrition and physical activity; freedom from pain, squalor, and cruelty; freedom to act in ways that are characteristic of the species (rather than to be confined and . . . made to perform silly and degrading stunts); freedom from fear and opportunities for rewarding interactions with other creatures of the same species, and of different species; a chance to enjoy the light and air in tranquility.”¹⁴¹ The capabilities approach focuses on a small list of core entitlements associated with these interests. Nussbaum views restraint as particularly important in this area—because animals are not taking part in creating the political principles that govern them, there is an especially high risk of imposing a form of life on them that the animals would not choose themselves.¹⁴²

Thus, Nussbaum emphasizes that the rights and protections afforded to animals should be broad and aimed at allowing them to fulfill their own ends. The notion of humankind as a “benevolent despot” presiding over animals that supplies their needs is “morally repugnant” under the capabilities approach.¹⁴³ The sovereignty of a species in and of itself has moral weight; part of flourishing for a creature means settling important matters on its own, free from human intervention.¹⁴⁴ For both domestic and wild animals, Nussbaum views decisions about when a material duty to help animals exists as similar to questions about foreign aid; it is something to be dealt with cautiously and in a way that balances numerous factors and enhances autonomy, instead of increasing dependency.¹⁴⁵ However, Nussbaum also concedes that this distinction of freedom from humans simply cannot be taken in full for all situations. A large number of animals, such as domestic house

¹³⁷ *Id.* at 363.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 371.

¹⁴¹ *Id.* at 326.

¹⁴² *Id.* at 352.

¹⁴³ *Id.* at 373.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 374–75.

animals, farm animals, and animals in zoos, live directly under human control. These animals would not survive and flourish currently but for human intervention for their nutrition and health.¹⁴⁶ As such, humans have direct obligations to them.¹⁴⁷ Nussbaum argues that humans should treat them as companions who are in need of prudent guardianship, but who are also endowed with entitlements of their own, even if those entitlements are vindicated via guardianship.¹⁴⁸

In order to transform a dignified existence into a set of entitlements, Nussbaum analyzes these rights in a species-specific way based on characteristic forms of life and flourishing.¹⁴⁹ She views animals as having certain rights to life, such as being secure against gratuitous killing for sport or luxury items, and being free from cruel practices in the process of food.¹⁵⁰ Nussbaum advocates for bodily integrity, especially in the form of integrity to be free from violence, such as declawing cats.¹⁵¹ Additionally, she calls for protecting bodily health and other extensions of entitlements that she views as required for a dignified existence.¹⁵²

III. FALLING SHORT: HOW NUSSBAUM'S CONCESSIONS CREATE LOGICAL INCONSISTENCIES

Nussbaum's capabilities approach offers a promising framework for providing meaningful rights to animals. By rooting her theory in justice over compassion, she convincingly reframes the discussion to focus on human wrongdoing to animals. Compassion is an inherently human-centric groundwork. Instead of affirmatively requiring humans to stop the harms they are causing to animals, it gives humans a get-out-of-jail free card of sorts. The approach keeps the focus on human generosity and makes any protections granted to animals a reflection of human kindness towards species that are still viewed as morally lesser.¹⁵³ Framing the issue around duty and justice, as Nussbaum points out, brings blame and causation back into focus.

Likewise, by arguing for entitlements that allow animals to lead a dignified life, Nussbaum provides for a potentially far more comprehensive approach to thinking about duties to and for animals. Although, to some extent, this approach will always inherently include biases towards what humans consider important and limitations on what humans understand about other species, it significantly curtails the concerns stemming from approaches such as Steven Wise's cogni-

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 374.

¹⁴⁸ *Id.* at 376.

¹⁴⁹ *Id.* at 392.

¹⁵⁰ *Id.* at 393.

¹⁵¹ *Id.* at 395.

¹⁵² *Id.* at 392–95.

¹⁵³ See Cora Diamond, *Eating Meat and Eating People*, in ANIMAL RIGHTS, *supra* note 44, at 93 (discussing “fundamental confusions about moral relations between people and people and between people and animals”).

tion-based arguments that import human scales of ‘intelligence’ that do not necessarily correlate with any meaningful notion of moral worth.¹⁵⁴ A dignified life approach for all (sentient) species levels the playing field. It deals more directly with addressing the inherent biases of preferring human traits to the traits of other beings. Nussbaum is convincing in articulating that the capabilities approach’s recognition of a diverse range of dignities and corresponding needs makes it more capable of creating norms of interspecies justice that are nuanced but rigorous.¹⁵⁵

A. *Understanding the Harms of Painless Death*

Although Nussbaum’s ideas are promising, she takes steps that both substantially limit the strength of her argument’s ability to address the shortcomings of other theories and significantly undercut the logical consistency of her theory’s application in some of the more challenging topics. These moves make her theory more palatable to current human beliefs (and her likely target audience), in that they require less alteration of current human behavior and allow for certain usages of animals that many individuals are hesitant to give up. However, they are ultimately inconsistent with key aspects of her theory and stated goals.

The clearest example of this can be seen in Nussbaum’s discussion of the painless killing of animals. Nussbaum considers life to be one of the fundamental entitlements animals receive under the capabilities approach. For human life, the only qualification to the capability of life is that one is not to be faced with “dying prematurely, or before one’s life is so reduced as to not be worth living.”¹⁵⁶ The qualification about a life “worth living” is present for animals as well, and in this way, represents a consistency in her treatment of life. She explicitly allows for euthanasia for animals that are incurably suffering.¹⁵⁷ This allowance aligns with her overall conception of a dignified life, assuming that the impairments the animal is facing when it is put down are truly impeding one of its central requisites to living meaningfully. Euthanasia would have to be carefully circumscribed to prevent misuse. Otherwise, it is consistent with the values she grants. However, for animals, Nussbaum adds additional qualifiers beyond a life “worth living,” such as security against gratuitous killing for sport and freedom from cruel practices in food processes.¹⁵⁸ Thus, animals can be killed for other purposes, most notably for food. Animals’ entitlement to life

¹⁵⁴ Nussbaum’s approach also successfully overcomes many of the main limitations of other current theories of animal rights, particularly utilitarian ones. A full discussion of how Nussbaum improves upon other specific theories is beyond the scope of this Note, which instead focuses on the more generalized philosophic implications and potentials of her work.

¹⁵⁵ See NUSSBAUM, *supra* note 58, at 327.

¹⁵⁶ *Id.* at 76.

¹⁵⁷ *Id.* at 393.

¹⁵⁸ *Id.*

is far more circumscribed and less absolute, but she fails to provide any clear explanation as to why animals, but not humans, have these types of qualifications.

Where Nussbaum most clearly deviates from her own principles is on the subject of the painless killing of otherwise healthy animals, presumably for human consumption. Nussbaum argues that if there is 'good' treatment during life and then painless death, this establishes a threshold of treatment that is "not very clearly in violation of any major animal capability, depending on how we understand the harm of a painless death for various types of animals."¹⁵⁹ She frames the question as follows: Are there centrally valuable forms of capability in animals' lives that are cut short by sudden painless death?¹⁶⁰ In her view, if the answer to that question is yes, then it is a harm to inflict death on animals in such a manner.¹⁶¹ In allowing for painless killing, it appears that Nussbaum's answer to this question is no.

However, Nussbaum herself discusses the challenge of understanding painless death earlier in the chapter, stating the capabilities approach has a "more difficult" time reaching the conclusion that there is nothing wrong with painless killing so long as the animals do not have an awareness of the temporality of their life.¹⁶² This is because the capabilities approach inherently recognizes that many goods and bads do not exist in forms of sentient awareness alone.¹⁶³ For example, a dog that is forced to live in isolation its entire life suffers a real harm, even though it is not aware of the more desirable alternative of a life with socialization.¹⁶⁴ Ultimately, Nussbaum takes the stance that painless death is a nuanced issue within the capabilities approach, and that as sentience increases, the potential harm of painless death increases. For example, she views the killing of a cow, which has the potential for more varied and complex interests, as a graver harm than the killing of a shrimp, which is relatively non-sentient and cannot feel any significant pain.¹⁶⁵ Nonetheless, she does not disallow either of those deaths. Nussbaum concedes that arguments made in this area are likely to be self-serving and biased towards human forms of life.¹⁶⁶ Ultimately though, she determines that it varies with the nature of the creature in question, and painless death may often be a less serious moral harm than the harm that comes from inflicting suffering.¹⁶⁷ Nussbaum's view is that it is best to focus first on reducing suffering

¹⁵⁹ *Id.* at 402.

¹⁶⁰ *Id.* at 386.

¹⁶¹ *Id.*

¹⁶² *Id.* at 385.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 386.

¹⁶⁵ *Id.* at 386–87.

¹⁶⁶ *Id.* at 387.

¹⁶⁷ *Id.*

and making death more painless; even this view, she states, is “utopian” based on current practices, but still a more realistic utopia.¹⁶⁸

After laying out a nuanced depiction of animals as beings capable and deserving of a dignified life, defined in large part by the ability to pursue one’s own varied ends and activities, Nussbaum’s treatment of painless death ultimately ends up feeling exactly how she conceded it may be: self-serving and biased towards human forms of life. Her inclusion of the notion that even calling for an end to animal suffering as being utopian indicates that her concessions are likely at least in part representative of a defeatist view on animal rights and a fear of advocating the currently widely unpopular stance of holding any killing of animals for human benefit to be morally problematic.¹⁶⁹

Furthermore, Nussbaum’s work lacks any explanation that would make it clear why the concession on painless death is nonetheless consistent with the tenants of the capabilities approach. In discussing human capabilities, Nussbaum claims that the “capabilities in question should be pruned for each and every person, treating each as an end and none as a mere tool of the ends of others.”¹⁷⁰ Nussbaum’s stance on how the capabilities approach can include animals within its framework of justice is that the *same* theory can be used directly for animals, thereby solving the problem presented in Rawlsian theory that leaves them out. Instead of creating a separate notion of theory or rights for animals, the capabilities are just adjusted based on what each animal appears to value. As such, she fails to provide any explanation as to why the underlying intuitive notion that individuals are to be treated exclusively as ends, and never as means, should not readily apply to species other than humans. It is understandable why there are certain human entitlements, such as voting in political elections, that simply do not make sense to extend to other species, because this entitlement would be essentially meaningless to them. However, those types of distinctions do not reconcile why animals are worthy of a life of dignity, but their life can justifiably be treated as a tool to human ends, especially where alternative food sources that do not require animal slaughter are plentiful.¹⁷¹ Indeed, the notion that a living being, whether aware of it or not, can be randomly killed at essentially any time seems to be entirely antithetical to any intuitive notions of a dignified life defined by the ability to perform one’s own chosen, varied life activities. Instead, it places value on a life only insofar as human beings deem the life worthy of existing. Once humans decide there is

¹⁶⁸ *Id.* at 402–43.

¹⁶⁹ See GARY FRANCIONE, *RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT* 3 (2005) (discussing welfarism and the welfarist approach).

¹⁷⁰ *Id.* at 70.

¹⁷¹ See generally REGAN, *supra* note 31, at 50.

more value in the animal's death than in its life, then the animal no longer has any say in its ends or actions.¹⁷²

Additionally, there are further specific tensions and questions raised by the notion of human use of animals for food that warrant more consideration Nussbaum provides. For example, a chicken raised for food was presumably intentionally bred and brought into the world for the ultimate end of (painlessly) killing it for meat. An animal intentionally being born for the express purpose of killing it, while perhaps not being majorly at odds with the notion of a dignified life, still seems to run at least somewhat counter to intuitive notions of dignity as she defines them. The chicken is intentionally brought into the world for the purpose of an end that can only be achieved by then intentionally cutting its life short. The chicken's entire existence is permeated with the notion of being a means for human ends, and Nussbaum offers no viable explanation as to why a life created expressly to be a means is acceptable for chickens in a way that it is not for humans. Furthermore, Nussbaum's theory focuses consistently on the quality of life and ability to pursue the ends suitable to one's capabilities. The goal is not to promote life per se, but instead to promote a dignified existence. Thus, although it is true that but for human desire to have the chicken for food, the chicken would not exist, that does not mean that the chicken's mere existence itself is a good within the confines of the capabilities approach.

B. *Autonomy, Dignity, and Use of Animals*

Although the notion of painless death as acceptable is the most evident inconsistency in Nussbaum's writing, it is not the only concession she makes that has potentially troubling implications for her argument. This issue is particularly salient with her conception of autonomy. Nussbaum specifically denounces the idea of the "benevolent despot" who supplies animals with their needs as "morally repugnant."¹⁷³ However, she also seems to espouse many activities that either are or readily could become significant violations of autonomy and sovereignty, under the guise of a "species sensitive paternalism" that takes into account the nature of each animal's flourishing.¹⁷⁴ For example, Nussbaum has no issue with horses being taught to jump hedges, perform dressage, or race.¹⁷⁵ She considers it "condescending" to assume that "lazing around the pasture" is a horse's only good.¹⁷⁶ This general concern is indeed understandable; it may be true that,

¹⁷² See Frederike Kaldewaij, *Animals and the Harm of Death*, in *THE ANIMAL ETHICS READER* 59 (Susan Armstrong & Richard Botzler eds., 2d ed. 2008) (providing a broader discussion of the inherent harms caused by acts such as painless death).

¹⁷³ NUSSBAUM, *supra* note 58, at 373.

¹⁷⁴ *Id.* at 377–78.

¹⁷⁵ *Id.* at 378.

¹⁷⁶ *Id.*

due to a history of domestication, horses require some type of prompting in order to get ultimately beneficial physical activity.

However, Nussbaum's approach seems to rely quite heavily on strong presumptions about what other species do and do not desire, even though she cautions against making such presumptions earlier.¹⁷⁷ Horse racing, given its extensive documentation of abuse and harm to the animals, is particularly troubling.¹⁷⁸ Surely to Nussbaum, horse racing is compatible with the capabilities approach so long as the animals are treated in a way that she would consider not to be cruel. It may be that it is possible for horses to race in a way that is healthy and fulfilling for them. However, horse racing is an activity that is clearly meant to achieve far more than benefit to the horse for the horse's sake.¹⁷⁹ Horse racing is a highly lucrative industry.¹⁸⁰ Nussbaum's claim that racing is a form of species-sensitive paternalism feels far less convincing when the horse's interests are being weighed against potentially vast sums of money for winning. Even more so, the notion that the racing is being done in the horse's interest, and that it continues to respect the horse's autonomy, feels far more hollow knowing what incentives are on the other side.

Nussbaum's amorphous conception of what autonomy means further leaves questions on issues such as the human use of eggs and dairy. Dairy in particular would, at face value, seem to be largely, if not entirely, incompatible with Nussbaum's notion of autonomy and sovereignty. Cows produce milk to feed their calves. Taking away that milk for human consumption would be a fairly egregious example of taking away the cow's bodily autonomy and impeding its instinctive desire to care for its young.¹⁸¹ Furthermore, it would likely require at least some separation of calves from their mothers.¹⁸² Studies have found that separating mother cows and calves shortly after birth has negative impacts on the calves' development.¹⁸³ As such, due to its infringement on autonomy and invocation of suffering and at least some

¹⁷⁷ *Id.* at 371.

¹⁷⁸ See Andrew Cohen, *The Ugly Truth About Horseracing*, ATLANTIC (Mar. 24, 2014), <http://www.theatlantic.com/entertainment/archive/2014/03/the-ugly-truth-about-horseracing/284594/> [https://perma.cc/UN34-3VEY] (accessed Aug. 3, 2018).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Cow Researchers Find Meaning Behind Moos*, BBC NEWS (Dec. 16, 2014), <http://www.bbc.com/news/uk-england-nottinghamshire-30484034> [https://perma.cc/T6VH-LRC6] (accessed Aug. 3, 2018) (finding cows make at least three distinct types of communications between mothers and calves, depending on age and distance apart).

¹⁸² See, e.g., *Early Separation of Cow and Calf has Long-term Effects on Social Behavior*, SCI. DAILY (Apr. 28, 2015), <https://www.sciencedaily.com/releases/2015/04/150428081801.htm> [https://perma.cc/Z85L-B4XM] (accessed Aug. 3, 2018) (describing how researchers conducted a controlled study of calves and varied the amount of contact they had with their mothers and the herd. The study found that differences could be seen in the calves' behavior and stress levels (indicated by the levels of the stress hormone cortisol). The calves that spent the most time with their mothers had the lowest stress levels and higher levels of activity, sociability, and social competence).

¹⁸³ *Id.*

degree of harm, dairy appears incompatible with Nussbaum's theory.¹⁸⁴

However, this would frankly leave Nussbaum's theory with an intuitively and logically strange outcome: it would be acceptable to take a cow's life, but not acceptable to take its milk. Realistically, based on Nussbaum's equivocal and selective accounts of harm and autonomy, it is likely that if addressed squarely, Nussbaum would defend the use of dairy, if done carefully. It could consistently be argued, within the framework of where she has left her theory, that so long as the cows and calves are not separated permanently, and sufficient milk is left for the calves, it is not a harm to the cow to take the milk.¹⁸⁵ This once again sets up perverse incentives, similar to horse racing, that are not actually on the cow's side. It requires numerous, serious assumptions about the cows' desires and what levels of milk can be safely taken.¹⁸⁶ Additionally, it will always be difficult to adequately safeguard cows against over-exploitation when there is profit involved on the other side. Unlike human workers, cows are unable to unionize, vocalize concerns in a way understandable to humans, or rally public support on their own.¹⁸⁷ Ultimately, the steps Nussbaum takes in laying out her conceptions of the entitlements granted to animals based on their capabilities leave her in a place that leads to either logically inconsistent outcomes for the allowable treatment of cows, or leaves cows in a place where autonomy-based rights seem weakly, if at all, protected.

¹⁸⁴ See MacKinnon, *supra* note 153, at 265–67 (discussing the use of female animals' bodies and reproductive capacities for human benefit).

¹⁸⁵ See generally Carol Adams, *The Rape of Animals, The Butchering of Women*, in THE ANIMAL ETHICS READER 268 (Susan Armstrong & Richard Botzler eds., 2d ed. 2008) (discussing the role of sexual violence and objectification in the dairy industry).

¹⁸⁶ Allowing for human usage of animals creates another type of tension that Nussbaum's theory does not reconcile well: breeding. If animals are to be used for their milk, eggs, or meat, it means these animals must come into existence some way. Currently, farm animals are specifically bred and raised to optimize human food consumption. To continue this process would mean to continue to regulate animals' reproductive functions and force female animals to carry babies when humans want them to do so. These acts would be significant impediments on autonomy and bodily integrity. The alternative would be to leave animals in situations that would ideally allow them to fulfill their instinctive breeding behaviors and then use the offspring they create for human purposes (while allegedly meeting the other needs of the animals to allow them to have dignified lives). This course of action would alleviate the most troubling aspects of breeding. However, it would still leave all the above-discussed tensions involving what ultimately happens to the baby animals once they are born. Additionally, the process of animal births would have to be very carefully monitored and handled to ensure it is actually happening roughly in line with the animals' instincts, desires, or both, and is not overly controlled by human influence, thereby eviscerating autonomy.

¹⁸⁷ See generally BOB TORRES, MAKING A KILLING: THE POLITICAL ECONOMY OF ANIMAL RIGHTS (2007) (discussing the important implications of animals being unable to communicate directly with humans).

C. *Changing the Nature of Guardianship*

If animals can be, even painlessly, killed for human use (and used in other ways for human purposes, such as being put on display in zoos),¹⁸⁸ it creates an additional, distinct set of issues for how Nussbaum conceptualizes the human-animal relationship under the capabilities approach. Nussbaum claims to be creating a relationship not based on the notion of a benevolent despot, but instead on that of a prudent guardian who looks over domesticated animals that hold meaningful entitlements themselves. However, by allowing humans to yield power over animals to the extent of being able to kill them for their own purposes and otherwise employ animals to their own benefit, it is hard to envision it not creating a strong asymmetry in power. In certain cases, such as domesticated dogs, one can readily see how humans could have a form of guardianship over animals without possessing such a degree of power over them in a way that delegitimizes their status as a being with its own dignified life. Humans created the conditions of domesticity, and the dogs would not be able to live in the wild on their own most likely. Humans may have the ability to euthanize the dog, but only in situations where it is suffering severely. Thus, this is reasonably a guardianship arrangement.

This could likewise be the case with, for example, a cow. Humans could care for the cow as its guardian until the cow reaches the natural end of its life (or truly needs euthanasia).¹⁸⁹ However, painless killing while the cow remains healthy for the purpose of human consumption does not indicate any type of guardianship. By having the ability to kill the cow at the human's will, Nussbaum fundamentally alters the relationship between animals and humans away from any meaningful form of guardianship. Once humans have the authority to make decisions that are both beneficial and *harmful* (because Nussbaum concedes that even painless death is likely not entirely harmless),¹⁹⁰ it is no longer a relationship of mutuality or caring paternalism.¹⁹¹ It is instead a relationship that, at the end of the day, results in human domination over the animals to force them to conform to human usage and ends.¹⁹² Even in the most benevolent case, like a person who occasionally takes eggs from her well cared-for chicken, the chicken still is ultimately becoming an end for the human.¹⁹³ While this situation

¹⁸⁸ NUSSBAUM, *supra* note 58, at 376.

¹⁸⁹ For purposes of this analysis, it is taken as a given that there are domestic animals who are in existence only because humans directly and actively bred them to be so. Many of these animals were bred to particular human specifications and to fulfill human interests (such as breeding chickens to have more breast meat).

¹⁹⁰ NUSSBAUM, *supra* note 58, at 402; *see also* KALDEWAIJ, *supra* note 172 (discussing whether painless death harms animals).

¹⁹¹ *See* MACKINNON, *supra* note 153, at 264–65 (discussing more broadly the potential problematic nature and implications of *any* rhetoric of human paternalism over animals).

¹⁹² TORRES, *supra* note 187, at 26.

¹⁹³ *Id.*

may not necessarily be problematic within Nussbaum's theory, the tension still requires attention and consideration.¹⁹⁴

D. "New Welfarism" and the Capabilities Approach

Nussbaum sets broad goals for where her theory will lead. A major one is to close a gap in the works of Rawls in order to make his theory of justice meaningful encompass animals.¹⁹⁵ She speaks broadly in terms of rights and entitlement-creating language, focusing on animal mistreatment as an issue of justice. Her capabilities approach to animal protection, at initial glance, fits readily into a rights-based conception, as opposed to a welfare-based one.¹⁹⁶ However, as discussed above, Nussbaum fails to fully extend her approach to provide a complete set of rights for other species. Her stance ends up fitting quite well into a phenomenon that Gary Francione calls "new welfarism." Francione defines new welfarism as a "hybrid position" with a long-term goal of animal rights, but a short-term goal of animal welfare.¹⁹⁷ Francione describes these types of advocates as people who see a connection between cleaner cages today and empty cages tomorrow.¹⁹⁸ This is quite explicitly an approach Nussbaum seems to take—she views it as "wise" to focus first on banning cruelty, then move "gradually" in the direction of a consensus against killing "at least the more completely sentient [animals]."¹⁹⁹ The result of this stance, Francione explains, is that despite a rhetorical use of rights and tackling institutionalized animal exploitation, the actual policies pursued by these approaches are functionally indistinguishable from people who explicitly endorse animal exploitation so long as it is "kinder."²⁰⁰

Through the concept of new welfarism, Francione draws attention to a mismatch between how advocates and theorists label themselves and what these individuals are actually calling for to happen. Blurring the line between advocating for welfare versus for rights has important impacts on both the theoretical and practical level. At its core, an approach that calls for welfarist reforms contains implicit acceptance of the utilization—and ultimately, exploitation—of animals.²⁰¹ Due to the different forms of communication used by humans and animals, animals cannot provide any meaningful consent to the use of their la-

¹⁹⁴ Ironically, Nussbaum specifically identifies the difference in how domestic house animals and domestic farm animals are treated as a "striking asymmetry" that "must be eliminated." Nonetheless, her theory as it currently stands fails to do so. NUSSBAUM, *supra* note 58, at 394.

¹⁹⁵ *Id.* at 6.

¹⁹⁶ *See supra* Part I.

¹⁹⁷ FRANCIONE, RAIN WITHOUT THUNDER, *supra* note 169, at 3.

¹⁹⁸ *Id.* at 3.

¹⁹⁹ NUSSBAUM, *supra* note 58, at 393.

²⁰⁰ FRANCIONE, RAIN WITHOUT THUNDER, *supra* note 169, at 3.

²⁰¹ TORRES, *supra* note 187, at 11.

bor by humans, meaning there is always a level of exploitation present when humans are using animals for their own gains.²⁰²

Thus, while new welfarist approaches claim to call for an end to animal exploitation, it may well be the case that these types of reforms to make the practices gentler ultimately only serve to *strengthen* existing systems of exploitation and do little if anything to work to dismantle them. In fact, over the past sixty years, there have been dramatic changes in animal agriculture practices that have resulted overall in increased levels of suffering and cruelty for farm animals.²⁰³ This same time period saw the development of “humane” laws that forbid “unnecessary suffering.”²⁰⁴ As it currently stands, even where laws requiring welfare and protection of animals exist, they have consistently proven inadequate at meaningfully protecting animals.²⁰⁵ These developments highlight one of the reasons that the “new welfarist” approach is not just practically dangerous if one’s goal is to effectively end the exploitation of animals, but also theoretically disingenuous to a framework that on its face claims to be granting rights.

Nussbaum indeed specifically couches her argument in the language of *rights*, not welfare. She claims that she is bringing animals into the Rawlsian justice framework under which humans are bound.²⁰⁶ Nussbaum then says that some of these rights may be attained gradually, if at all.²⁰⁷ This raises a major moral question: if it is asserted that, based on the capabilities they have today, animals have fundamental entitlements that exist today, then how is it morally acceptable to compromise those rights until a gradual (if ever) consensus is formed in favor of protecting them?²⁰⁸ If Nussbaum’s capabilities approach truly is creating rights, it seems morally unacceptable to limit the granting of some of these rights based on the gradual, unguaranteed change in consensus that human beings may make over time.²⁰⁹ Further, this gradualist approach would seem outright strange for humans. The mere fact that a rights violation is committed painlessly against humans does not change the fact that it is a violation.²¹⁰

Ultimately, Nussbaum’s decision to allow certain uses of animals for human gain continues to institutionalize and implicitly accept the exploitation of other species. By allowing the animals to be used at the hands of humans for profit and in a way that does not hinge on natural instincts and specie requirements (such as, for example, a lion in the

²⁰² See MACKINNON, *supra* note 153, at 265–66 (discussing the use of animals as property that persists even under “humane” treatment regimes).

²⁰³ FRANCIONE, RAIN WITHOUT THUNDER, *supra* note 169, at 137.

²⁰⁴ *Id.* at 138.

²⁰⁵ FRANCIONE, ANIMAL RIGHTS, *supra* note 46, at 46.

²⁰⁶ NUSSBAUM, *supra* note 63, at 21.

²⁰⁷ *Id.* at 399–400.

²⁰⁸ FRANCIONE, RAIN WITHOUT THUNDER, *supra* note 169, at 4.

²⁰⁹ See FRANCIONE, ANIMAL RIGHTS, *supra* note 46, at 46.

²¹⁰ MACKINNON, *supra* note 191, at 265–67.

wild hunting an antelope, which is both a natural behavior and a source of food required for survival), Nussbaum's capabilities approach fails to actually follow through on providing animals with meaningful entitlements to allow for a truly dignified life.

It furthermore significantly weakens the grounding of *all* of her broader human rights claims. Nussbaum's approach to human rights, particularly for people with severe mental disabilities, is grounded in the same notion of dignity and capability. Rights for people with severe mental disabilities that may impact levels of 'sentience' and the ends that the individuals are able to pursue are on weaker ground when, in analogous situations for non-human animals, the animals' protections are not steadfast and are instead pinned to popular consensus. Additionally, granting meaningful rights and extending justice to people with severe disabilities may be more readily put on the backburner while issues perceived as 'more pressing' are dealt with first. This outcome means that people with severe disabilities, like nonhuman animals, can be excluded from the basic theory of justice. Even if this exclusion is just temporary, it remains problematic based on the theoretical goals and underpinnings of Nussbaum's theory. Nussbaum was setting out to *close* gaps in Rawls' work; she was addressing the ways that he left people with disabilities and animals out of his equations as an issue to be dealt with at another time.²¹¹ In allowing for the slow and un-promised granting of rights to animals (in a way that could equally apply to people with severe disabilities), Nussbaum fails to fully achieve her stated end. She critiques Rawls for having a starting point that necessarily failed to adequately include people with disabilities and animals.²¹² However, her end point for animals, which at minimum allows for killing sentient beings for human purposes for at least some undefined period of time, ultimately finds animals still facing a different conception of justice than humans face.

IV. REDEEMING THE CAPABILITIES APPROACH AND RESTORING LOGICAL CONSISTENCY

As discussed in the beginning of Part II, Nussbaum's capabilities approach is promising in its potential to overcome many of the obstacles to providing meaningful and comprehensive protections to animals. If taken fully, Nussbaum's theory envisions a system of justice that includes animals within it from the start and at its most basic threshold. What makes the capabilities approach particularly strong for those seeking a comprehensive approach to animal rights is that it fundamentally thinks big picture and bottom up. For scholars like Steven Wise, the goal is to incorporate animals into already-existing human structures without changing those structures or how humans

²¹¹ See NUSSBAUM, *supra* note 58, at 23 (discussing the issues that Rawls recognized as problematic for his theory of justice).

²¹² *Id.*

understand them.²¹³ The basic theoretical underpinnings of those rights are not altered.²¹⁴ For the capabilities approach, it is redefining how humans as a society think about political and moral structures—its explicit goal is to formulate thresholds that cannot be violated, and then move forward to establish political systems to get to that point.²¹⁵

While this may sound like a semantic difference, and perhaps an intellectual rather than practical pursuit, it has important implications. Although people cannot go back in time to reform society, it is still possible to evolve and reformulate baselines of justice, as has been done across many capacities over time already.²¹⁶ Nussbaum's reformulation of justice leads to a framework that inherently includes animals, not one that reaches out at human whims to include some animals some of the time. As such, it gives animal rights activists stronger, firmer ground on which to stand when advocating for changes in policy. Animal rights extended on the basis of compassion are not steadfast. If the basis for protecting an animal is because humans are being nice, if pressed in any meaningful way against any human interests, it will be easy to retract or reduce compassion levels. Although not impossible, it is significantly more difficult to make such a retraction when the rights are rooted in justice. Taking steps that violate existing norms of justice is a decision that will almost surely be taken far more seriously than a change in the norms of compassion. Even if human compassion leads to granting rights of a sort to animals, it almost surely will convey far less gravity and seriousness as holistically incorporating animals into our conception of justice.

Thus, although Nussbaum takes actions that diminish the efficacy of the theory, the theory itself can be taken to a more logically consistent end. It involves taking what are likely to be considered much more 'radical' stances than Nussbaum herself takes. However, by just reaffirming more strongly certain aspects of the approach, her theory can draw lines where they are needed while still maintaining flexibility in allowing for human-animal interaction. One way to do so is by adding two core entitlements that span across all sentient²¹⁷ beings and are granted in addition to the species-specific entitlements each may re-

²¹³ See Wise, *supra* note 4, at 33 (arguing that because most of the world "links basic liberty rights to autonomy, and because autonomy is often seen as the foundation of human dignity" animals that meet "the requirements for practical autonomy" are "entitled to basic liberty rights").

²¹⁴ *Id.*

²¹⁵ See NUSSBAUM, *supra* note 58, at 82 (explaining how the capabilities approach starts from a fair outcome, then "seeks political structures" with "controversial moral work going into the design" that will achieve that outcome "as nearly as possible").

²¹⁶ For example, in early feminist movements, the goal was not to change the system of justice to have special rights for women. Instead, it was to broaden the existing conception of justice so that women were incorporated under it in the same way as men. See, e.g., MacKinnon, *supra* note 153 (discussing intersections between the oppression of women and animals).

²¹⁷ Nussbaum uses sentience as her basic threshold for animals included in the capabilities approach. See NUSSBAUM, *supra* note 58, at 393 (arguing that sentient animals

ceive. First is the right for animals not to be used solely for human benefit. Second is the right for animals not to be used for human profit.

It seems apparent, based on Nussbaum's conceptions of dignity and hesitance towards human definitions of other species' values, that the utilization of animals for purely human benefit, with no situation of true necessity, is inherently incompatible with a meaningful application of the capabilities approach.²¹⁸ As discussed above, when animals can be used and killed for human means, it fundamentally alters the sensitive paternalism and guardianship Nussbaum purports to establish.²¹⁹ The only way to preserve any meaningful form of guardianship over animals that humans have domesticated and made dependent on assistance is to say that these animals have a full right to be treated as solely an end in and of themselves.²²⁰ Each animal has its own good that humans sometimes have to help it achieve, for example by providing it adequate food and shelter, but humans do not have the right to treat it as a human means. To truly preserve their entitlements, it requires drawing firm lines between human intervention for the animal's benefit and for the human's benefit.²²¹

Note that there is still flexibility in this method of applying the capabilities approach. It does not necessitate there be no human involvement with animals beyond the bare minimums. If a true case of self-defense arises, for example, naturally, actions to save one's own life may need to be taken. Additionally, it leaves room for carefully prescribed euthanasia in instances where continued life would cause great suffering and limited enjoyment. But it also leaves room for human involvement in less grave situations. For example, riding horses, if done appropriately in a way that does not hurt the horses, may

"have secure entitlement against gratuitous killing"). This threshold is accepted for purposes of the ensuing analysis.

²¹⁸ This section, and this Note overall, focuses on Nussbaum's approach as applied to domesticated animals, not animals in the wild. Nussbaum's approach, as she articulates it, provides more robust protection for wild animals. Even when painless death is allowed, this still eliminates essentially all forms of hunting for sport and trapping. Additionally, the standards suggested in this Note would apply with equal force to wild animals.

²¹⁹ See TORRES, *supra* note 187, at 26 ("The moment we use another being instrumentally, we have denied that being its right to exist on its own terms, whether that being is human or non-human."); see also Kim Stallwood, *Utopian Visions and Pragmatic Politics: Challenging the Foundations of Speciesism and Misothery*, in ANIMAL RIGHTS: THE CHANGING DEBATES, *supra* note 20, at 194, 195 (explaining that when animals are used for labor, to provide services, or to produce commodities, they are "reduced to the status of economic units of production, sources of entertainment or adornment, or objects to be manipulated for human ends").

²²⁰ See MacKinnon, *supra* note 153, at 266 (describing the like treatment of animals and women in determining their moral status and treatment).

²²¹ See Ted Benton, *Animal Rights: An Eco-Socialist View*, in ANIMAL RIGHTS: THE CHANGING DEBATES, *supra* note 20, at 19, 37 (explaining that while domesticated animals have been rendered "dependent on human social practices and relations for their well-being," any practices that harm the interests of animals "cannot be morally justified").

be acceptable. This is an activity that, while often providing benefit in the form of enjoyment to humans, also benefits the horse by providing it with healthy exercise and, most likely, meaningful interaction with humans (a tenant of a dignified life²²²). What this approach calls into question is activity like horse *racing*. Unlike with horse riding, horse racing's end goal is not enjoyment for both the human and the horse, but instead victory (and presumably money) for the human. A tangential benefit may be acquired for the horse, but that is not the ultimate goal.

Second, horse racing highlights what has been a recurring theme throughout this critique and what ultimately many of the current exploitations of animals can be traced back to: money. Once the human relationship to an animal is interceded with a motive to profit off the animal's work, the notion of guardianship and mutual dignity gets cut off or, at the very least, fundamentally altered to one where the human has substantial personal interests and the animal is the tool to attain them.²²³ Additionally, when profit is involved, it will, to some degree, inherently involve a balancing between the animal's interests and the human's desire to create more money. What is good for the animal is not necessarily good for the bottom line, and animals cannot express their interests in a language cognizable by humans to protect themselves.²²⁴

To allow for genuine entitlements for animals to exist and flourish, animals need the right not to be treated as a means for profit. The right to not be used for profit is both a broader and narrower entitlement than the one to not be used for solely human ends. The right not to be used as an end implicitly, to some degree, covers the right not to be used for profit, insofar as profit is solely a human end. To this extent, it's a narrower subset of a broader right. However, as the horse racing example highlights, the right not to be used for profit is also broader. It unquestionably eliminates an activity like high-stakes horse racing from the picture by closing off arguments that would say that the human's gains are not the only benefits stemming from the race. If any form of horse racing did still exist, without self-enrichment incentives on one side, it would significantly moderate the adverse incentives to mistreat and over-race the horses. This entitlement would be a somewhat different entitlement than what humans get, because human labor naturally can be used for profit. However, it is fully compatible with the entitlements humans hold, as humans cannot under

²²² See NUSSBAUM, *supra* note 58, at 394 (arguing that animals have a right to bodily health).

²²³ See TORRES, *supra* note 187, at 11 (explaining that when animals are used as "ends towards the production of greater capital" they become "nothing more than living machines, transformed from beings who live for themselves into beings that live for capital").

²²⁴ See MacKinnon, *supra* note 153, at 270 (addressing the "speaking for the other problem" in animal law, in which laws are formed and defined by humans' relationship with animals from a human perspective without asking the animals).

this theory non-consensually be used for their labor.²²⁵ Although animals may give indicators of their happiness and comfort levels, they cannot make any type of realistic consent agreement to work stipulated on certain wages being returned to them.²²⁶

Deeming profit to be fundamentally out of the picture is a strong line and may exclude some behavior that admittedly would not itself be necessarily harmful to the animals. However, the introduction of profit into the human-animal relationship also will always, to a more than de minimis degree, place vastly more unilateral power in the hands of the humans over the animals.²²⁷ Even if the humans do not misuse or overexploit the animal for increased profit, they are still ultimately using the animal's body or labor for their own gain, without a reciprocal, agreed upon return for the animal.²²⁸ By drawing the line broadly and firmly, Nussbaum's vision of prudent guardianship can take a meaningful form.

Past human activity, including extensive breeding programs for consumption and aesthetic purposes, has created millions of animals currently in existence and likely unable to adequately take care of themselves on their own.²²⁹ There is no 'natural' state of being for them outside of how humans bred and created them. Nonetheless, they are living, sentient beings. By focusing on providing for the necessities to allow them to flourish, it is possible for humans to enable these animals to lead lives where they can pursue their own varied life activities alongside humans. Like caretakers of people with disabilities, another being may provide assistance in meeting certain life activities. While this inherently means the caretaker has some degree of power, neither party is asymmetrically given legitimate power to cause harm to the other.²³⁰

Thus, these two added rights reframe the balance of power between humans and animals to be more symmetric. It eliminates oddities where Nussbaum claims that the capabilities approach is being extended to animals, but it actually results in different, sometimes in-

²²⁵ See TORRES, *supra* note 187, at 19 (discussing the similarities between the exploitation of animal labor and human slavery); see also Benton, *supra* note 221, at 41 (discussing the benefits of eliminating the reification and commodification in social relations between humans and animals).

²²⁶ See MacKinnon, *supra* note 153, at 270 (discussing the various indicators animals use to "dissent from human hegemony" and the difficulty in interpreting them).

²²⁷ See TORRES, *supra* note 187, at 26 (arguing that any form of profit from a human-animal relationship, "even so-called less exploitative forms," are "morally wrong," reify human dominance, and result in an "almost unilateral benefit").

²²⁸ *Id.*

²²⁹ See Benton, *supra* note 221, at 37 (explaining that the human social practices of removing animal ancestors from their natural habitats have "rendered the populations of these species in 'domestication' peculiarly dependent on human social practices and relations for their well-being").

²³⁰ See *id.* at 41 (discussing the difficulty in developing "a moral framework for human/animal relations" that respects animals' species-specific mode of life, and pointing to the relationship between "human carers" and "working animals" as providing valuable insights).

consistent outcomes compared to what is allowed for humans. Instead, by including two blanket entitlements for animals that are consistent with the entitlements given to humans, it gives credence to making one comprehensive theory of justice for all people and animals. Those two entitlements, combined with the simple but important set of rights and commitment to each individual life implicit in the capabilities approach already, should protect animals from exploitation at the hands of humans, while still leaving room for healthy, meaningful relationships between humans and animals, and naturally forming relationships in the wild between different species.

V. CONCLUSION

In developing a framework for a Rawlsian conception of justice that includes animals, Martha Nussbaum sets out to establish what seems like comprehensive, meaningful rights for animals. By rooting her argument in notions of dignity and individual capabilities, Nussbaum's work allows for practical and theoretically consistent delineations of the types of rights each animal should be afforded. However, in applying her theory, Nussbaum makes concessions that significantly undercut her theory's efficacy and strength. By allowing for actions such as (painlessly) killing animals for human consumption and profit, long before their natural end of life, Nussbaum creates a gross asymmetry in power between humans and animals. She recreates human domination over animals in a system that leaves animals subject to a different conception of justice, not the same one that humans are bound to live under.

In order to make Nussbaum's theory internally consistent and to allow it to provide meaningful rights for animals, clearer lines must be drawn. By making a firm commitment that animals cannot be used exclusively for human ends or for human profit, her theory can create a comprehensive framework of justice that fosters healthy human-animal interaction. This reinstates a balance where the realistic need for human guardianship over certain animals can be met while minimizing any exploitative asymmetries in power. Balancing the symmetries between the relationships and taking money out of the equation can result in incorporating animals into the same conception of justice to the fullest extent possible.

For animal rights activists, a robust conception of the capabilities approach provides a useful approach for how best to convey the importance of meaningful animal rights to those who currently may be reluctant to consider animals' lives on a comparable plane. The theory can elucidate why current practices towards animals are problematic and provide reasons why humans should view animals as equally deserving of rights, even though they are 'different' from people. Additionally, a robust capabilities approach provides for clear guidelines for the types of policies that will and will not truly advance animal rights. It challenges new welfarism head-on, eliminating the inconsistencies

surrounding speaking in terms of rights but advocating for continued, 'nicer' exploitation in the short-run. These inconsistencies may muddle activists' goals and create policy that is less effective than they hope. In sum, the capabilities approach offers an ambitious but promising framework for both establishing the importance of animal rights and creating policy to meaningfully enact it.